Association of Highway Steel Transporters, Inc.
Webb Transfer Line, Inc., et al.
Miller Motor Express, Inc.
Be-Mac Transport Co., Inc.
Grever Truck Line.
Oklahoma-Louisiana Motor Freight Company, Inc.
E. L. Powell and Sons Trucking Co.
Wilson Truck Co.
American Transfer & Storage Co.
W. J. Record and Sons Trucking Company.
Van Stone, doing business as Stone Trucking Co.
John W. Presley, doing business as Security Trucking Co.
Long Transportation Company.
Akron-Chicago Transportation Co., Inc.
Dixie Ohio Express Co.
Continental Transportation Lines, Inc.
Service Transport Co.
The J. Miller Company, et al.
Summit Fast Freight, Inc., et al.
Kramer Bros. Freight Lines, Inc.
Wenham Transportation, Inc.
Cooper-Jarrett, Inc.
All States Freight, Inc.
Middlewest Eastern Seaboard Motor Carriers Conference, Inc.
Berrodin Transport, Inc., et al.
Transamerican Freight Lines, Inc.
American Transit Lines, Inc.
Gordons Transports, Inc., et al.
Heavy Haulers, Inc.
Sam W. Lacy, doing business as Lacy Transport Company.
Motor-Ways, Inc.
Chicago Express, Inc.
Liberty Motor Freight Lines, Inc., et al.
Pacific Motor Trucking Company.
Austin Truck Service, et al.
Yankee Lines, Inc.
H. W. Brown Transportation Co., Inc.
North American Van Lines, Inc., et al.
[fols. 224-310] Farson Motor Lines, Inc.

Case Driveaway, Inc.
R. N. Ellsworth, doing business as Ellsworth Sales Co.
E. Brooke Matlack, Inc., et al.

[fol. 311] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed September 26, 1951

The Interstate Commerce Commission, defendant in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

First Defense

As a first defense to the allegations of the complaint, the Commission alleges that its order of May 8, 1951, the validity of which is involved in this suit, was entered in a proceeding on the Commission's docket, known as Ex Parte MC-43, *Lease and Interchange of Vehicles by Motor Carriers*, 52 M. C. C. 675, wherein the Commission prescribed rules and regulations to be observed by motor common and contract carriers of property subject to Part II of the Interstate Commerce Act, governing the practices of such carriers in the leasing and interchange of motor-vehicle [fol. 312] equipment, which rules and regulations are nation-wide in character and subject to review in a great number of jurisdictions because of such fact; that, prior to the filing of the complaint herein on August 21, 1951, there was a suit filed on August 16, 1951 by 21 motor carriers in the United States District Court for the Southern District of Indiana, Terre Haute Division, docketed as *Eastern Motor Express, Inc., et al.* v. *United States and Interstate*

Commerce Commission, Civil Action No. 464, attacking the validity of the Commission's order prescribing these rul- and regulations, and that on September 14, 1951, the Commission filed its answer to the complaint and, so far as defendant Interstate Commerce Commission is concerned, such case is now at issu- that on August 16, 1951, there was filed a suit in the U. S. District Court for the Eastern District of Michigan, docketed as *Movers Conference of America, et al.* v. *United States,* Civil Action No. 10834, involving similar issues; that there are reports of the filing of numerous other suits, attacking the same order of the Commission; that all of such filed and potential suits involve the same or similar issues; that to require the courts to hear and counsel to defend all of such suits would result in needless expense and consumption of time by court and co-sel, as well as (undoubtedly) the certification of the large reco- before the Commission in each of these cases; therefor, motion is made that the plaintiffs herein, having a legal right to intervene and participate in the suit filed in the Indiana District Court, above referred to, be directed by order of this Court to so intervene under the appropriate statute conferring such right on these plaintiffs; that the issues in the suit filed in the Federal Court in Indiana are substantially similar to the issues raised in this suit, and can be determined by that Court, and that this suit be dis- [fol. 313] missed. As authority for this motion, the Commission respectfully refers the Court to the decision of the Supreme Court in *Kansas City Southern Railway Company, et al.* v. *United States,* 282 U. S. 760.

Second Defense

Without waiving the first defense, the Commission answers the complaint filed herein as follows:

I

Answering the allegations of paragraph I of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph II of the complaint, the Commission admits the organization and incor-

poration of American Trucking Associations, Inc., National Automobile Transporters Association, and Association of Highway Steel Transporters and that these three plaintiffs participated in the proceedings before the Commission. The Commission also admits that plaintiffs, Malone Freight Lines, Inc., Baggett Transportation Company, Commercial Carriers, Inc., Highway Express, Inc., Gordons Transports, Inc., George F. Alger Company, Michigan Motor Freight Lines, Inc., Automobile Shippers, Inc., Service Transport Company, United Transports, Inc., Tompkins Motor Lines, Inc., Watkins Motor Lines, Inc., Coats Motor Transfer Company, Inc., and Georgia-Florida Motor Express, Inc., are motor carriers operating under the provisions of Part II of the Interstate Commerce Act, to the extent that they possess lawful certificates from the Interstate Commerce Commission authorizing such operations. The Commission disclaims information to form a belief as to the truth of the other allegations contained in said paragraph concerning the extent to which said plaintiffs find it necessary [fol. 314] to supplement their fleet of vehicles with other vehicles, or as to the extent thereof, and as to the amount of revenues obtained through, or number of miles operated by, vehicle which these plaintiffs lease.

III

Answering the allegations of the first two subparagraphs of paragraph III of the complaint, the Commission admits the same, except that the Commission disclaims information sufficient to form a belief as to whether the rules submitted to the Commission by plaintiff, American Trucking Associations, Inc., were approved as reasonable by the majority of the industry.

Answering the allegations of subparagraph 3 of paragraph III of the complaint, the Commission admits the same except that the Commission refers the Court to the rules suggested by plaintiff, American Trucking Associations, Inc., and the rules prescribed by Division 5, for a comparison as to the differences in the rules.

Answering the allegations of the next subparagraph, 4, of paragraph III of the complaint, the Commission admits the same, except that the Commission alleges that the rules

promulgated by its order of May 8, 1951, were not "more restricted than the evidence before the Commission warranted". The Commission also admits that petitions for reconsideration were filed by the carriers herein and others, as set out in said subparagraph, and that upon consideration thereof the Commission postponed the effective date of its order, previously to become effective on August 1, 1951, to September 1, 1951.

IV

Answering the allegations of paragraph IV of the complaint the Commission admits the same.

[fol. 315]

V

Answering the allegations of paragraph V of the complaint, the Commission admits the same, except that the Commission alleges that the effective date of its order has been postponed from September 1, 1951 until November 1, 1951.

VI

Answering the allegations of paragraph VI of the complaint, the Commission admits the same, except that the Commission denies that in its final report and order, it concluded that the Commission has virtually unlimited authority to regulate and prohibit lease and interchange practices of motor carriers, and in this connection it respectfully refers the Court to its report of May 8, 1951, for a more complete statement concerning the findings and conclusions of the Commission.

VII

Answering the allegations of paragraph VII of the complaint the Commission denies the same.

VIII

Answering the allegations of paragraph VIII of the complaint the Commission denies the same.

IX

Answering the allegations of paragraph IX of the complaint, the Commission denies the same.

X

Answering the allegations of paragraph X of the complaint, the Commission denies the same.

XI

Answering the allegations of paragraph XI of the complaint, the Commission denies the same.

XII

Answering the allegations of paragraph XII of the complaint, the Commission denies the same.

[fol. 316] XIII

Answering the allegations of paragraph XIII of the complaint, the Commission denies the same.

XIV

Answering the allegations of paragraph XIV of the complaint, the Commission denies the same.

XV

Further answering the allegations of the complaint, the Commission admits and alleges that in the proceedings in the docket before this Court, the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded a full and fair hearing; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in said reports of June 26, 1950 and May 8, 1951, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties

to said proceedings, including the plaintiffs herein, its said reports of June 26, 1950 and May 8, 1951, the report of May 8, 1951, being annexed to and made part of the complaint as Exhibit "C"; that said report included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its said report and subsequent orders were based.

[fol. 317] The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that the findings and conclusions in said report of May 8, 1951, were not made nor entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said report and orders are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said report and orders cause, or will cause, plaintiffs either irreparable damage or any damage if said report and orders are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report referred to and made part of the complaint as Exhibit "C".

[fols. 318-319] All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By: E. M. Reidy, Associate Chief Counsel. S. R. Howell, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

September 24, 1951.

[fol. 320] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY OF PLAINTIFFS TO MOTION OF INTERSTATE COMMERCE COMMISSION—Filed October 5, 1951

The American Trucking Associations, et al., plaintiffs in the above entitled case, for reply to the motion made by the Interstate Commerce Commission in its answer of September 24, 1951, replies and says the motion should be denied for the following reasons:

I

The suit by twenty-one motor carriers in the United States District Court for the Southern District of Indiana, Terre Haute Division, on August 6, 1951, was filed only five days before the above captioned case was filed at Birmingham, Alabama.

[fol. 321] II

The complaint herein is on behalf of fourteen specific motor carriers; the American Trucking Associations, Inc. on behalf of its members, too numerous to individually name; National Automobile Transporters Associations, on behalf of its more than one hundred motor common carriers, and Association of Highway Steel Transporters on behalf of more than fifty motor common and contract carriers. Plaintiffs in this case are numerous and represent

the majority of the motor carrier industry throughout the country affected by the Commission's order of May 8, 1951. Many of the plaintiffs are located within the jurisdiction of this Court.

III

In addition to the plaintiffs, other interested parties have intervened in this proceeding including the Florida Citrus Commission and the Shippers League of Florida. The Southeastern Association of Railroad and Utility Commissioners composed of State Regulatory Commissions of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee have signified their intention to intervene. These intervenors are located for the most part, within the jurisdiction of the Court. There are also reports that other important parties contemplate intervention in this case.

IV

The Commission, in answering the complaint in Civil Action No. 464, Eastern Motor Express, et al., v. United States and Interstate Commerce Commission, in the United States District Court for the Southern District of Indiana, Terre Haute Division, "questions the right of an infinitesimal segment of the motor carriers affected" to bring the suit.

[fol. 322] Assuming that this is not a frivolous defense, the only consistent action for the Commission would be to urge consolidation of the Indiana case with the Birmingham case, rather than the opposite. No question as to parties in interest, industry representation, or carriers affected can be raised in the case now pending in the United States District Court for the Northern District of Alabama, Southern Division. As shown in the record, plaintiff A. T. A. is speaking for the majority of the motor carrier industry.

V

Plaintiffs in this case attempted to have all parties affected by the Commission's order join together and avoid a multiplicity of suits. This called for conferences that necessarily delayed the filing of the complaint. A sincere

effort was made on the part of plaintiffs to avoid the necessity of filing suits in several jurisdictions; this is evidenced by the large number of plaintiffs joined in this suit. Even though plaintiffs were unsuccessful in having complete joinder, the parties have a right to bring suits in convenient jurisdictions and there appears no valid ground for dismissal because of less representative suits in other jurisdictions.

VI

The only authority cited by the Interstate Commerce Commission in support of the motion is *Kansas City Southern Railway Company, et al.*, v. *U. S.*, 282 U. S. 760. The cases are not on all fours. At page 762 of the *Kansas City Southern* case it is noted that one of the two suits involved "was begun in February, 1930, sometime after the suit of the Louisville and Nashville R. R. Co., supra, assailing the same orders, was brought in the District Court for the Western District of Kentucky." There was a considerable [fol. 323] lapse of time between the filing of the two suits; in the instant cases, only five days elapsed between the filings, and for all practical purpose, the cases were filed simultaneously.

The facts in the Kansas City Southern case further disclose that the earlier case had been decided before the later was tried. The extended lapse of time is an important factor not present in the cases now pending.

In the Kansas City Southern case, at page 763, the Court said: "but the existence of jurisdiction does not mean that it must be exercised and that grounds may not be shown for staying the hand of the Court." The Court continued: "The question is thus one for the sound discretion of the District Court, in which such a suit is brought, to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, to the end that there may not be a multiplicity of suits without substantial reason."

Plaintiffs take no position on whether or not there should be a consolidation, but if the Court, in exercising its sound discretion, determines that there should be a staying of any proceeding, great consideration should be given to the

number and domicile of plaintiffs in the case before the Court in the Northern District of Alabama. Further, we respectfully submit that the Court should consider the filing dates of the various suits as simultaneous and make its decision without reference to the precise filing date.

The Defendant Commission has failed to establish sufficient reason for dismissing or staying these proceedings. [fols. 324-330] Wherefore plaintiffs pray said motion be dismissed and that this case be assigned for argument on its merits.

Respectfully submitted, Marc Ray Clements, Walter P. Gewin, George A. LeMaistre, Tuscaloosa, Alabama; Edgar. S. Idol, Harry E. Boot, James W. Wrape, George S. Dixon, Herbert Baker, Joseph H. Blackshear, Noel F. George, William R. Hefferan, Attorneys for Plaintiffs.

October 4, 1951.

[File endorsement omitted.]

[fol. 331] In United States District Court

[Title omitted]

Answer of the United States of America—Filed October 15, 1951

Now comes the United States of America, a defendant herein, by counsel, and in answer to the complaint says:

I

The Department of Agriculture has filed a motion to intervene as a plaintiff in this case and has also filed an intervening complaint seeking to have the order of the Interstate Commerce Commission here involved set aside.

II

A situation is thus presented where one Government agency is seeking to intervene as a party plaintiff in this

case and another Government agency, the Interstate Commerce Commission, is a defendant in the same case. Under these circumstances, and in view of the fact that both Government agencies will have an opportunity to present their respective position through their own counsel, the United States does not oppose the Commission's order, but does not participate in its defense.

[fols. 332-336] III

Accordingly, the United States neither admits nor denies any of the allegations of the complaint of the above plaintiffs or the intervening complaint of the Department of Agriculture.

John F. Baecher, Special Assistant to the Attorney General. John H. D. Wigger, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Attorneys for the United States of America.

H. G. Morrison, Assistant Attorney General.

James E. Kilday, Special Assistant to the Attorney General.

John D. Hill, United States Attorney.

Certificate of Service (omitted in printing).

[File endorsement omitted.]

[fol. 337] In United States District Court

[Title omitted]

Complaint

I

Intervening plaintiff, the Secretary of Agriculture of the United States (herein referred to as the Secretary), brings this complaint to suspend, enjoin, annul and set aside the order of the Interstate Commerce Commission (herein referred to as the Commission) entered on May 8, 1951, in a

proceeding before the Commission entitled "Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers.*" The jurisdiction of the court is founded upon sec-
[fol. 338] tions 205(g) and 205(h) of the Interstate Commerce Act (49 U. S. C. 1946 ed. 305(g) and 305(h)), sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code (28 U. S. C. 1946 ed. Supp. IV 1336, 1398, 2284 and 2321-2325), and section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1946 ed. 1291).

II

The United States of America is named as a party defendant pursuant to section 2322 of the Judicial Code (28 U. S. C. 1946 ed. Supp. IV 2322).

III

The Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887 (24 Stat. 383), with specifically vested powers and duties respecting interstate commerce under the said Act and the acts amendatory thereof and supplemental thereto, hereinafter referred to as the Interstate Commerce Act.

IV

By petition dated October 14, 1949, the Secretary sought leave to intervene in Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers.* The petition was granted by order of the Commission dated October 25, 1949, and the Secretary actively participated in all subsequent phases of the administrative proceeding.

V

Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers* was instituted on January 9, 1948, by the Commission, Division 5, by means of the issuance on its own motion of an order instituting an investigation into the lawfulness of the vehicle interchange and lease practices of motor common and contract carriers of property subject to the Commission's jurisdiction.

[fol. 339] Formal hearings were held in Washington, D. C., and St. Louis, Missouri. After such hearings, briefs were filed by various parties; a proposed report of the hearing examiner was served upon the parties; exceptions and replies thereto were filed; and the Commission, Division 5, on June 26, 1950, entered an order modifying that proposed by the examiner.

On October 30, 1950, oral argument was heard by the entire Commission and on May 8, 1951, the Commission issued its final order to become effective August 1, 1951. On July 16, 1951, the Secretary filed a petition for reopening and reconsideration with the Commission. A copy of the Secretary's petition is attached hereto as an appendix. This petition and other similar petitions were denied by the Commission on August 1, 1951.

The Secretary adopts by reference Exhibits "A" to "E", inclusive, attached to the original plaintiffs' bill of complaint, under Rule 10(c) of the Rules of Civil Procedure (28 U. S. C. 1946 ed. 10(c)), as if set forth herein in full.

VI

The Secretary alleges that the said order of the Commission dated May 8, 1951, in Ex Parte No. MC-43, *Lease and Interchange of Vehicles by Motor Carriers*, is based upon errors of law, exceeds the statutory authority of the Commission, and is unlawful, arbitrary, unreasonable and null and void for the following reasons:

(1) The Commission is without authority under sections 202(a), 203(a)(14) and (15) and 204 of the Interstate Commerce Act (49 U. S. C. 1946 ed. 302(a), 303(a)(14) and (15), and 304) or any other provision of such Act to issue rules and regulations limiting the right of motor carriers to utilize leased equipment in conducting their operations; [fol. 340] (2) Rules 207.4(a)(3) and (4) specified in the Commission's order contravene the clear intent and purpose of sections 208(a) and 209(b) of the Interstate Commerce Act (49 U. S. C. 1946 ed. 308(a) and 309(b)), which expressly forbid the Commission to impose in certificates of public convenience and necessity and permits terms, conditions or limitations restricting the right of common and contract carriers by motor vehicle to augment their equip-

ment and facilities as the development of their respective businesses and the demands of the public shall require;

(3) The order of the Commission is unlawful, arbitrary, unreasonable and null and void for the reason that Rules 207.4(a)(3) and (4) provided for therein virtually nullify the agricultural exemptions contained in sections 203(b)-(4a), (5) and (6) of the Interstate Commerce Act (49 U. S. C. 1946 ed. 303(b)(4a), (5) and 6));

(4) The order of the Commission is contrary to the National Transportation Policy as contained in the Interstate Commerce Act (49 U. S. C. 1946 ed. immediately preceeding section 1) in that Rules 207.4(a)(3) and (4) specified therein prohibit operators of motor vehicles transporting agricultural commodities and farm supplies under section 203-(b)(4a), (5) and (6) of the Interstate Commerce Act (49 U. S. C. 1946 ed. 303(b)(4a), (5) and (6)) from trip-leasing equipment to Commission-regulated carriers and thereby result in increased mileage without cargo and higher transportation costs to the public; and

(5) Assuming, *arguendo*, that the Commission has authority to issue rules governing lease and interchange of equipment, the rules specified in the Commission's order are arbitrary and unreasonable.

VII

Wherefore, the Secretary prays that the Court suspend, enjoin, annul, and set aside the order of the Commission entered in the proceeding entitled "Ex Parte No. MC-43, [fols. 341-396] *Lease and Interchange of Vehicles by Motor Carriers*" on May 8, 1951, and that the Secretary have such other and further relief in the premises as in equity may appertain and as may be deemed by the Court fit and proper.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Charles W. Bucy, Associate Solicitor. Henry A. Cockrum, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

Certificate of Service (omitted in printing).

[fols. 397-398] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—Monday, October 22nd, 1951

This cause coming on to be heard, this day, before a three-judge Court composed of Honorable Leon McCord, United States Circuit Judge, for the Fifth Circuit, the Honorable C. B. Kennamer, United States District Judge, Middle District of Alabama, and the Honorable Seybourn H. Lynne, United States District Judge, Northern District of Alabama, the case being at issue on plaintiffs complaint and answer of the defendants thereto, the trial of this cause is begun.

Thereupon, the motion of railroads for stay of proceedings being heard, considered and understood by the Court, is hereby overruled and denied. Whereupon, this case is submitted by agreement of parties on the pleadings and on briefs to be submitted. The parties are allowed fifteen days to file briefs and ten days in which to file reply briefs.

This cause is hereby taken under advisement by the Court.

[fol. 399] IN UNITED STATES DISTRICT COURT

[Title omitted]

Birmingham, Alabama.

Transcript of Proceedings—October 22, 1951

Before Honorable Leon McCord, Honorable S. H. Lynne, Honorable C. B. Kennamer

APPEARANCES:

Mr. Robert G. Seaks, Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C., Counsel for Teamsters Union.

Mr. Joseph H. Blackshear, P. O. Box 395, Gainesville, Georgia, Watkins Motor Lines, Inc.; Georgia-Florida Mo-

tor Express, Inc.; and Coats Motor Transfer Company, Inc.

Mr. M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, Orlando, Florida, Florida Citrus Commission; and Growers & Shippers League of Florida.

[fol. 400] Mr. Noel F. George, 44 E. Broad Street, Columbus 15, Ohio, for Plaintiffs, steel haulers.

Mr. Herbert Baker, A. I. U. Building, Columbus, Ohio, one association and one individual complainant.

Mr. Samuel R. Howell, Asst. Chief Counsel, Interstate Commerce Commission, Washington, D. C.

Mr. Carl Helmetag, Jr., 1770 Broad Street Station Building, Philadelphia, Pa. Class I American Railroads.

Mr. Joseph F. Johnston, 9th Floor First National Building, Birmingham 3, Alabama.

Mr. Henry A. Cockrum, Attorney, Office of the Solicitor, U. S. Department of Agriculture, Washington 25, D. C.

Mr. John S. Burchmore, Walter, Burchmore & Belnap, 2106 Field Building, Chicago 3, Illinois, National Industrial Traffic League.

Mr. Edgar S. Idol, 1424 16th Street, N. W., Washington 6, D. C., American Trucking Associations, Inc.

Mr. Guyte P. McCord, Jr., Asst. Counsel, Florida R. R. & Public Utilities Commission, 700 S. Adams Street, Tallahassee, Florida.

Mr. Bland Goodwin, Jr., Georgia Public Service Commission, Atlanta, Georgia, for S. E. Assn. of R. R. & Pub. U. Commissioners. Amicus curiae.

Mr. James W. Wrape, Wrape & Hernly, Sterick Building, Memphis, Tennessee, for the Plaintiffs.

Messrs. Marc Ray Clement, Geo. A. LeMaistre, Walter P. Gewin, LeMaistre, Clement & Gewin, P. O. Box 423, Tuscaloosa, Alabama.

Mr. George S. Dixon, Matheson, Dixon & Brady, Guardian Building, Detroit 26, Michigan, National Automobile Transporters Association; and 3 individual Plaintiff carriers.

Mr. J. Douglas Harris, Attorney, Alabama Public Service Commission, 555 Dexter Avenue, Montgomery, Alabama.

[fol. 401] Judge McCord: Gentlemen of the Bar, the

court announces to you we have only one case, and I have requested Judge Lynne to make a statement to you at this time. Judge Lynne.

Judge Lynne: Gentlemen, all of the attorneys who appear on the pleadings for the parties, the original parties to this action, and also the intervenors, are herewith admitted to practice in this court for the purpose of this case.

Now, because we don't know all of you, I am going to ask the attorneys from other districts to identify themselves now so that we will know who you are. I will start with the attorneys who may be seated in the jury box. Stand, each one of you, and identify yourselves.

(Respective counsel identified themselves as shown in the list of appearances.)

Judge Lynne: Gentlemen, I believe that all of the petitions for leave to intervene have been granted, and that there are none which have not been acted on.

There is a motion before this court, and without considering the question as to whether or not it is proper for me as Judge of this District Court, or the statutory three Judge court to pass on that motion, we are going to consider first the motion filed in behalf of the intervening Class I Railroads for a stay of the proceedings in this case. That motion was filed on October 10, 1951.

I don't know whether all attorneys have received a copy [fol. 402] of that motion or not, but in order for this court to consider it intelligently I think we should invite a discussion of the facts which might be relevant to that motion. Barely outlined are the facts, as we know them, on the allegations of the motion, are that a suit attacking the order of the Commission was first filed in a District Court in Indiana; that there is likewise pending a similar action in a District Court in Illinois and a District Court in Michigan.

Now we are also informed that a hearing was held in Detroit on last Monday, or was scheduled for hearing on last Monday, October 16. Is that correct?

Mr. Howell: That has been delayed now until November 5.

Judge Lynne: It was set?

Mr. Howell: The case has been set for hearing I think on the merits for November 30.

Judge Lynne: We were also told that the Indiana case, which was the first suit filed, has been set for next Monday.

Mr. Howell: I think that case has definitely been set for argument on the merits for November 19.

Judge Lynne: Those two dates are out of the way, October 16th and 29th.

We want to know whether the issues in the Indiana case are identical with the issues in this case.

Mr. Howell: We think they are. If there is any difference, it would be minor differences, but the prineipal alle-
[fol. 403] gations are the same in both cases.

Judge Lynne: Is that also true of the Detroit case?

Mr. Howell: I think that is true of the Detroit case also.

Judge Lynne: Is there anyone here who will dispute that statement? It occurred to us in an informal discussion this morning that the pattern of the cases should be the same; that it could be that either some of the Plaintiffs or some of the Intervenors might be complaining of a single rule that might not fit the others. We are not sure about that, and we would like to know that.

Mr. Idol: I think we would agree the issues are substantially the same in all cases. Some of the Plaintiffs take a somewhat different position as to the effect of the order and what should be done, but substantially the suits are the same.

Judge Lynne: How about the Indiana case?

Mr. Idol: The Indiana case, I think the issues would not differ materially at all. However, with respect to the hearing of the Detroit case, I talked to counsel for the Plaintiffs there last night. He tells me there is no hearing set, and he does not expect to have one until late in November.

Mr. Burchmore: Speaking for the National Industrial Traffic League, we are prepared to appear in whatever case comes on first. I think there are one or two that have not
[fol. 404] been mentioned. I have the impression that the strength of the opposition to the order, that is the variety of opponents to the order is much greater here than in those other cases. This is really the principal case of the group

brought by the American Trucking Association and others, and it seems to me it is the leading case in importance. This case was filed first, but I think they got the other one printed first.

Mr. Wells: I am appearing for the Florida Citrus Association and Growers & Shippers League of Florida, and not on behalf of any carriers, either rail or motor. I am not personally familiar with the pleadings or issues in the Michigan or Indiana cases, but I am not questioning at all the statements made with respect to those issues. However, it is of great importance to us in Florida to have as early a decision as possible. And not only because of the nearness to Florida of this proceeding in geographical scope, but also because of the nature of it, we had intervened as Plaintiffs here, and because of that we do urge that the court proceed on the merits in this particular proceeding.

Mr. McCord: I represent the Florida Railroad & Public Utilities Commission, and our position is quite similar to that of the Florida Citrus Association as expressed by Mr. Wells. We agree with his position. We would prefer that the case be kept here in this area, rather than it be transferred or held in abeyance pending a decision in another circuit.

[fol. 405] Mr. Johnston: If we have heard from the Intervenors, I suppose it would be appropriate for the railroads who filed this motion to state what they conceive to be the considerations which would lead to this stay. I will ask Mr. Helmetag, who has represented the railroads in the proceedings before the Commission, to state the situation.

As I see it, it is really a question of comity among all these courts where you have proceedings filed involving identical issues.

There is no purpose in taking up the time of four Federal Courts to try the same issues. We feel that the case filed and at issue first should proceed first. We don't see why all of the issues cannot be determined in the other courts.

It doesn't seem to me that the fact that there are a large number of Intervenors from this area in this particular case, interested in the issues, would at all affect, or would have much weight with the court as to what court tries

the case, in view of the fact it is not a case in which there are issues of fact to be presented by new evidence before a jury or before the court. The case is tried on the record, and will be tried on briefs, and parties may obviously represent their interests in any court in which the case may arise. Mr. Helmetag.

Mr. Helmetag: I would like to point out that these rules and regulations which are involved are nationwide in scope. They affect the whole motor carrier industry, not particular [fol. 406] carriers, but the industry as a whole.

The suit was first started in Indiana. The Commission first filed its answer in Indiana, and therefore the issue was first joined in Indiana. Here we are concerned with, as parties Defendants, with the Commission, in defending its order. That is we only have to defend one case.

We feel that if the court here would stay the proceedings, and if the courts in Detroit and Chicago would stay the proceedings, then we could go forward with the Indiana case. There are no interlocutory matters pending in Indiana. The court has set the case for hearing on the 19th of November on the merits, and on the question of the interlocutory injunction.

Further I would like to point out that the Commission has extended the effective date of the rules until December 1, 1951, so that there is no immediate harm to any of the motor carriers affected by the rules and regulations.

I think too that the Supreme Court has indicated that in situations like this that the court should stay the proceedings, or may stay the proceedings to prevent hardship to the Defendant. I don't think there will be any hardship to these various Plaintiffs and people intervening for the Plaintiffs, because they can as a matter of right intervene in the Indiana suit, present their arguments and materials in support of their views, and be governed by the decision of the Indiana court. And we feel it would simplify and expedite matters for this court to stay the proceedings [fol. 407] here and let the Indiana court go ahead.

The date of November 19 would give the parties sufficient time to prepare briefs and arguments on the merits. And in that connection I would like to point out that this is a very involved case. The record has almost 4,000 pages;

there are over 100 exhibits; there are numerous pleadings and exceptions and replies to exceptions; a long report by the Examiner; an equally long report by Division 5 of the Commission; and finally a full and comprehensive report by the Commission.

Now to prepare a brief and to abstract all of that material for presentation to the court in a concise and simple argument is quite a job. We feel that if we could have one case we could do the job better. And to do it here as well as in the other court is a little too much we think for counsel to undertake. And we ask this court to stay the proceedings here, keeping in mind that there won't be any hardship worked against any Plaintiff.

Mr. Seaks: On behalf of the Teamsters Union we wish to join in that motion. We think it would be very burdensome to require us to go to four different courts. We had one counsel continuously during the proceedings, who attended all of the hearings, and the matter of time and travel is burdensome.

The Indiana case having been joined first, we would like to join in the motion to stay this case.

Mr. Idol: We filed a reply to the similar motion in the [fol. 408] Commission's answer. Our position there taken would be the same with respect to the railroads motion. We recognize the fact that it is desirable to avoid undue multiplicity of suits, and we attempted prior to the filing of any proceedings to avoid that situation. I requested a conference of all attorneys interested in the matter on our side of the case, and they in fact attended a conference at my office in Washington. I urged that we all join in the filing of one suit, or that parties who did not wish to become joint parties, intervene in a single proceeding.

The decision reached at that meeting resulted in the filing by all Plaintiffs there represented except two or three of this case. Our filing was five days later in the case in Indiana because it takes more time for a number of lawyers to agree on pleading than if one lawyer handles it alone.

We believe if any case is heard, this should be the case. If there is to be a stay in any proceeding we think that

they should be stayed there. We have made every attempt to avoid a multiplicity of suits.

So far as the decision cited by the Commission and the Railroads with respect to the matter is concerned, the language of the Supreme Court there is dictum. In that case a motion to eliminate or stay the hearing of the second case was denied and was sustained by the Supreme Court, although the court did say that there could be circumstances under which a District Court should refuse to [fol. 409] hold a second or third hearing on the same issue. However, that matter was left, in the Supreme Court's language, to the discretion of the court.

Mr. Johnston. It seems to me that the answer to the suggestion that the request for stay and for relief against a multiplicity of defenses around the country is that it comes too late. The Indiana court has set the case on the merits.

I don't think we can assume that they contend that a series of motions should be filed now in that court to reverse its setting of the case. And, that is the first case, that is the case in which logically they should go forward, and in which the parties I think should reasonably anticipate and prepare to defend. That would be the case that was first filed. The suggestion that we start over and reconsider the thing is somewhat late.

The court has set the case for hearing, and within ample time prior to the effective date of the Commission's order, to take care of the parties.

Judge Lynne: Has a three Judge court been constituted in Indiana?

Mr. Helmetag: Yes, sir.

Mr. Burchmore: When was that set?

Mr. Helmetag: November 19.

Mr. Burchmore: The assignment was only last Thursday or Friday.

[fol. 410] Judge Lynne: You mean the order constituting the court?

Mr. Howell: I haven't seen that order. We got a notice signed by Judge Stanley of Indianapolis, saying the court would hear the Indiana suit on the merits on the 19th of

November. Nothing was indicated as to who the court would be.

Mr. Burchmore: It seems to me this is the situation in which any one of the courts should proceed. That court has not been constituted in Indian ahead of your court. That case was only set for hearing in Indianapolis by request of the Plaintiffs therein almost at the last moment; it must have been Thursday or Friday, because I inquired Thursday. If your Honors feel that you should grant this motion, then all of us are going to have to go up there and intervene in a case there, and make that the leading case, whereas this is the leading case now and we are all here to argue it. Your Honors could escape some painful work, and not be really avoiding your responsibility, you can get out of having to listen to all of us by granting the motion. On the other hand, you can accommodate a good many people here on the side of the Plaintiffs, and only disappoint the Defendants.

A Voice: On the subject of which is the main case, quite a few people have asked where they should intervene, and they have been told that inasmuch as the issues were joined first in Indiana, and the Commission had set up as a defense to all of the other suits that that case had been first filed, we [fol. 411] have suggested that the Intervenors should intervene in Indiana, and there only. Parties in the State of Washington and some of the other Western States contemplate intervening there. From the aspect of the Florida and Georgia Commissions, we can't meet every one's convenience. We have gone through the issues fixed by the two complaints, and we think that perhaps Mr. Idol will agree that there is no difference, there is the constitutionality, the statutory challenge, and the allegations that the evidence does not support the Commission's order. But they are almost identical in terms, and ask for identical relief.

Judge McCord: In the Indiana case, have they passed on the pleadings?

The Voice: No, sir, I wouldn't say they have passed on the pleadings.

Judge McCord: Their answers are in?

The Voice: Yes, sir, the answer of some of the parties are in. Our answer is in.

Judge McCord: I am trying to find out if they have passed on the pleadings and are ready for a trial.

A Voice: That has been my understanding from the Interstate Commerce Commission. I think we were told some weeks ago that their docket was crowded, and it would be late November, and I think that was perhaps a month ago. Am I right?

Mr. Howell: Yes.

[fol. 412] The Voice: Then the date was finally fixed as the 19th?

Mr. Howell: That's right. All of the pleadings I think, interventions and everything, have already been filed in the Indiana court, and answers have been filed and the issues joined.

The Commission, of course, made a motion to require the Plaintiffs in this suit to dismiss their suit here and intervene in the Indiana court because we thought, since that case was the first one filed, it would be first heard. In order to avoid having to defend four suits, we thought we would make the Indiana suit the principal suit, but this court had been convened and the case set for today so we got ready and prepared our brief and we are ready to proceed, but we are not insisting on our motion to continue or to require consolidation with the Indianapolis suit. Nor are we insisting on a hearing today, but we announce that we are ready if the court should decide to hear the case on its merits today.

Judge Lynne: Has the United States appeared and answered?

Mr. Howell: The United States I believe is not appearing in this case, although the suit was filed against them as statutory defendants. They said they would not be able to participate in the defense, inasmuch as the Department of Agriculture, a sister agency, was in the suit as a party. We thought we were related to them too, but they decided not to defend the suit.

[fol. 413] Judge McCord: Who do you represent?

Mr. Howell: The Interstate Commerce Commission.

Mr. Cockrum: The Secretary has intervened as a party

Plaintiff in this proceeding. We got our notice by the clerk of the court stating that this matter was coming on for hearing today. We presumed that it was for hearing on the merits. We have our brief. We first learned of the motion by the intervening Defendant Railroads yesterday while on the train coming down here.

In so far as the matter of time is concerned, both cases, the Indiana and this one, have been filed for some time. The Defendants contend that the issues are the same, or substantially the same. It seems to me that their argument and their brief in this case would be substantially the same as in the other cases.

If this court proceeds to argument on the merits in this case the other courts I believe will probably postpone or stay their action, so on behalf of the Secretary of Agriculture, in order to avoid coming back down here at a future date to argue the case on the merits, I suggest that we proceed to argument of the case on the merits.

Mr. Johnston: Counsel for the Department of Agriculture says he had no notice of this motion. I suppose the reason is that the Department of Agriculture did not intervene until after the motion was filed. Presumably he was charged with knowledge of the state of the pleadings under which [fol. 414] he filed.

I will say this that, as far as the matter of proceeding here on the merits is concerned, we would have to ask that, on behalf of the railroads, we be allowed further time to prepare briefs in this very complicated matter. We are not prepared to make a final submission on the merits at this time under any circumstances. I think in view of the voluminous character of the record and the fact we have had to give attention to all of these other proceedings is one of the reasons why we ask that they be limited to one. Otherwise we will be in the position of having to brief this case, and prepare one in Indiana, and possibly the others all at the same time. It is just not conducive to either a proper presentation to the courts, or to our own defense, to have our efforts scattered out in this way.

A Voice: We are in the same shape. We took our cue from the answer filed by the Interstate Commerce Commission, which set up the defense of the prior Indianapolis

suit in all of the other three suits, and we made the assumption, perhaps in error, that we would go ahead in Indianapolis, and in each of the other jurisdictions there would be motions to stay. We would not be prepared to go forward finally on the merits today. We had understood until just yesterday that all that was concerned today was an argument on the motion.

Judge Lynne: Has anybody seen the order constituting [fol. 415] the statutory court in any other district?

Mr. Howell: There was no such order when I left Washington on Friday. At least we had not received any.

Mr. Johnston: Obviously it would not be set in Indiana had the court not been constituted.

Judge Lynne: You can set it without constituting a court. The District Court has a right to set it on an interlocutory proceeding without the constitution of a court. That is what we want to find out, whether there is available a court. Sometimes it is difficult to constitute a three Judge court, and we have one here. However, we want to hear from you. We want to develop the facts before we go into a conference to discuss it. We don't want to work a hardship on anybody. We want to do all we can to avoid a multiplicity of suits.

Mr. Idol: Counsel for the carriers who filed the suit in Indianapolis met with our group in Washington and reserved their decision as to whether or not he would join with us in the filing of a single proceeding. I was informed about a week after that that he and his clients had decided they preferred to proceed individually, knowing that we intended to file a suit in Birmingham. I don't think that this large number of Plaintiffs represented here should be forced into some other proceeding because that one carrier represented by one attorney made a decision not to be in the same proceeding with us, knowing that would [fol. 416] result in at least two suits being filed.

Judge Lynne: How many Intervenors are there in the Indiana suit?

A Voice: We are not Intervenors in this other case as yet. So far as the pleadings are concerned, if this case is deferred, there will be numbers of motions to intervene that those other courts will have to pass upon, and all of

us will have to go to Indiana and Detroit and elsewhere and intervene. The issues are not made because we are not yet in it.

A Voice: We followed the lead of the National Association of Truckers, the American Trucking Association and intervened in that case because we felt that obviously that is the proper case.

A Voice: Now, if the court please, as to being caught short in preparation, I would have the court know that for years this matter has been at issue before the Interstate Commerce Commission. These railroads haven't anything new to deal with. As to the Teamsters, they have initiated the matter, practically. They have been in it for years, they are fully familiar with every issue of it, as they would be the elements of a deed.

To argue this case is simply to draw on one's past knowledge. I feel that they should go ahead. And in any event, you can permit the filing of a brief. I think the issues here are made. I represent a large group of truckers in the northern [fol. 417] part of the country, and whose interests are incidental, as those in the South. We are ready. We joined this matter. If you turn us down and send us to Indiana or to Chicago or Detroit we would have to start all over again and intervene. Those courts would have to get together and pass on our intervention. It is a long line of complications, and this case is the one that is ready. The court is convened. The matter has been set down for arguments on the merits. We are ready to go ahead, and to me it is inconceivable that we would all be shunted off to the Southern District of Indiana.

A Voice: The only point I desire to mention is one that I mentioned a moment ago, and that is in respect to the statement of the carriers that they are not fully prepared with briefs now, if we can proceed with the arguments on the merits today, and if it is deemed advisable to, in the interest of justice, that briefs be filed, may I suggest that it would be appropriate for the court to consider the allowing of a reasonable time in which they may be presented? Certainly there would be no prejudice to the rail carriers in that method of proceeding.

Judge Lynne: This certainly illustrates what Mr. Justice

Jackson meant when he said "The more you explain it, the less I understand it."

I think we have the facts on which we should exercise a discretion. One fact is that nobody knows whether a three [fol. 418] Judge court is available either in Indiana or in Michigan. When I say "Available", I mean constituted now by an order of the Senior Circuit Judge. Nobody knows that. We do have one here.

Nobody knows how many Intervenors there are presently in the Indiana suit. It is represented to us that most of the Intervenors here have not intervened in that suit.

Mr. Cockrum: The Secretary of Agriculture has intervened in the Indiana suit.

Mr. Howell: There are a number of Intervenors in the Indianapolis suit, not probably as many as here, but there are quite a number.

Judge Lynne: As I understand it, the Interstate Commerce Commission—and gentlemen, you be perfectly frank with us—it is not a question with us as to whether we are going to abdicate our jurisdiction and pass the buck to another court, but if the Defendant in this case, the real Defendant, the Commission, would tell us that it had a preference for another jurisdiction, then that would be a minor factor, it would weigh on us in the exercise of our discretion. It would not, of course, control because the Plaintiff has a right to select its forum. The Plaintiffs have a right to select their forum, and that is a primary right, but as we understand it at this point the Commission is not prepared to say that it has a preference in jurisdictions.

[fol. 419] Mr. Howell: No, your Honor, we don't have any preference. We certainly would hate to see any intervening Defendants or anybody else for that matter inconvenienced and injured in the presentation of their case. We don't want to take that position, but we merely say we have no preference as to one court over the other. We indicated in our motion here that we would like to have everybody join in the Indianapolis suit because we thought that was the first one filed and the first one to be heard, but we have no preference. I don't want to be understood as indicating that we would like to proceed

here now, if it would result in injury to any people on our side.

Judge Lynne: I know that. These skirmishes are no more than minor tactics at best. Some court is going to have to decide the issues on the merits.

The next question I am sure that we will want to consider at a conference is whether or not you gentlemen are willing, either actually willing or reluctantly willing to submit this case for final judgment on the merits on the prayer for final injunction, not the temporary injunction. That would not help anybody. The compliance date has been moved back until certainly a court will have abundant opportunity to decide it one way or the other.

But I specifically would like to ask this question, suppose today the parties to this action, both the original parties and the intervening parties would stipulate to submit the [fol. 420] case on the prayer for final injunction, with a right, fixed by agreement, to file briefs within a specified time, if this court decides that it will not stay this proceeding after conferring, and exercising the discretion as best we can, then we would like to get it out of the way, we would like to get to trial and dispose of it. That is a question that I would like to explore at this time. If anybody has an objection to that, I would like to hear from them.

Mr. Johnston: It is entirely satisfactory to the Intervenors, I would say that.

Mr. Seaks: We would be quite reluctant, for this reason, Senator Wheeler is our Chief Counsel and has been familiar with this case. And he accepted a speaking engagement in Chicago for today some months ago, and as I say as of Friday or Saturday when I left Washington I was under the impression that all that was involved was the motion for stay, here today. Certainly I know my client, the Teamsters Union, is going to wish to be represented by its Chief Counsel, Senator Wheeler, and have him speak to the merits of it.

Mr. Burchmore: Your question was whether we objected to submitting it on briefs to be filed shortly?

Judge Lynne: It would be my thought that all we should do today would be to pass on the motion for stay, and if

we decided that that motion should be denied, then we should fix a time within which briefs should be filed.

[fol. 421] All parties might stipulate to submit it on the merits and on the prayer for final injunctive relief. Then if you gentlemen desire to supplement your brief by oral argument at a fixed date, we could hear the case, having the benefit of briefs before the argument, having an oral argument on the merits.

Mr. Johnston: That is fully satisfactory to us.

Mr. Cockrum: It is fully satisfactory to the Secretary.

Judge Lynne: Don't be bashful about voicing your objections, if you have any. We are trying to exercise discretion, and we want to know these things, don't we?

Judge McCord: Oh, yes.

Judge Lynne: Gentlemen, I think that we will take a recess of about ten to fifteen minutes and confer, and then come back in.

(Thereupon, a recess was taken.)

Judge McCord: Judge Lynnne, will you state the conclusion of these three Judges?

Judge Lynne: Gentlemen, we feel that the motion for a stay should be denied, and it is accordingly overruled.

Now, the consensus of opinion among the three of us is that you gentlemen should be asked whether you will stipulate now that this action be submtited for final judgment of the court on Plaintiffs prayer for a final injunction; that those of you who care to might make an oral argument today; that those of you who desire to may submit briefs within the next two weeks; to the end that there would not [fol. 422] have to be another setting of this case for reargument. And we want you to speak very frankly on that proposition. The court has asked you that question, whether you are willing to do that.

Mr. Idol: For the Plaintiffs that course of action would be most desirable, and we would be very happy to see that carried out.

Judge McCord: Did you understand Judge Lynne asked if you would stipulate that you would not only move this up on your prayer for a temporary injunction, but for a permanent injunction, hear it all at once, stipulate that

we hear that, and then we hear argument today, with the right for anyone here to file a brief within fifteen days? Let's see if there is anyone who objects to that.

Mr. Johnston: One reservation as to the argument. We would prefer, if possible, to have the briefs filed, and then set it down for argument in the event anybody wants argument, or feels that argument thereafter is necessary.

I say that because of the large number of Intervenors here whose positions are not yet entirely clear, and may not be, unless we have an entire round of argument at this time, it may well be that counsel would not be apprised of the full position of all the parties on an oral argument only until the briefs are in, after which it would be a lot easier to argue the case intelligently, after seeing everybody's position.

[fol. 423] Judge McCord: You know, there is a lot in what you say, but I never saw any lawyers just get together all at once. If we wait, there will be someone sick, and he won't be here. It's so big, why can't you do this, I am not telling you how, we are just talking, but what I want to get over to you is, couldn't we hear it today, could we get a stipulation, as my colleague has said, on hearing it on the temporary injunction and on the permanent injunction right here? You can have one or two to argue, or three, to argue for an hour each, and the others could, if they wanted to, they could suggest anything that they want said, and we could hear the argument today, with the right within fifteen days to put in a brief.

Mr. Johnston: Might I make this one suggestion then, perhaps? In view of the fact that I gather, certainly the Teamsters, and perhaps others, are not prepared to make a full dress argument on the case on the merits today, the briefs will all come in simultaneously and be served on everybody. Somebody might then want an opportunity to either file a reply brief or have an oral argument on the briefs filed. It seems to me that one step more may be necessary to the procedure suggested by the court.

I want to say the submission on the merits is entirely and wholly agreeable to the railroads, the Intervenors, and I understand to the Interstate Commerce Commission, but I suggest this opportunity for reply, and perhaps for a reply

in the form of an oral argument might be necessary, the [fol. 424] way we are going at this, because of the fact I don't think the arguments today on behalf of three or four people would fully develop all of the positions in this case.

Judge McCord: If they don't, couldn't they reach it in their briefs? We'll read these briefs.

Mr. Johnston: That means a reply. The opportunity for reply is the only addition.

Judge McCord: What we are trying to do is to come to a decision. This is an important thing, it is one of the most importance to both sides. I wish I wasn't in it, but we are here, and it looks to me like we can have this argument today, but if there is objection I am not going to insist on it.

Mr. Burchmore: I printed and brought with me a memorandum brief. I call it that because it doesn't conform to all of the rules. It is just 21 pages. That ought to appeal to the court in a case of this magnitude. I would like to serve this today and get rid of it. I think Brother Idol has written his brief.

Judge McCord: We have a Judge here on the bench that has dug into every phase of it. I am going to stop because I can't state it as well as he can. I think I understand it, but he can state it better than I can.

Mr. Cockrum: On behalf of the Secretary of Agriculture of the United States, we are perfectly agreeable to the suggestion of the court that argument be had today and [fol. 425] briefs be filed subsequently.

Mr. Seaks: We would be prefectly agreeable to go ahead on the merits at the time when we would be prepared to argue, but we are not prepared today. We had the misimpression that it would not reach the merits today. Our Chief Counsel is not here, and is not prepared. If we are going ahead with the final argument, I think it should be some two weeks in the future. Serving briefs today would certainly serve a great deal in the shortening of the issues, and getting a better argument.

Judge Lynne: I would like to find out, because I think it is important, whether anybody was told or got the impression from anything that I said that this case would be submitted today only on the motion to stay? Now, that is

important. If anybody got that impression, then it would certainly guide us in what we should do. I remember we did have some correspondence, Senator Wheeler wrote a letter personally, signed it personally.

Mr. Seaks: Yes, sir.

Judge Lynne: Did he receive any reply from anybody in the court that indicated——

Mr. Seaks: We received only a notice from the clerk saying it had been set for hearing. We then spoke to Mr. *Leva* and Mr. Howell. We were told by Mr. *Leva* that he was uncertain as to the matter of hearing, whether it was [fol. 426] a final hearing on the merits or on the motion. I think Mr. Howell and myself have had a course of two or three telephone conversations during the last week, and I think that it was—when, Mr. Howell?

Mr. Howell: I don't know.

Mr. Seaks: Friday?

Mr. Howell: That was the last time we talked about it.

Mr. Seaks: (Continuing) That there was a possibility that it would reach the merits. Before that we had been under the impression the merits would not be at issue.

Mr. Howell: I had told him we didn't know whether it would be heard on the merits or the motion, but we would be ready for both.

Judge Lynne: That is really the impression I intended to convey. Of course, we would have to dispose of the motion before we would ever reach the other.

Gentlemen, let's bring the matter into a little sharper focus. Judge McCord and Judge Kennamer, of course, are concerned with having to come back here on another day to hear arguments, which would be very sharply limited arguments. You gentlemen couldn't review the record in an oral argument on the proposition that these rules might be unreasonable; you couldn't possibly. So far as I am concerned, it would be a very laborious proposition to study that. With the aid of your briefs I think that I could go [fol. 427] a little further into that question.

On the statutory and constitutional issues I think that oral argument could be made today. And I see no reason, I am speaking very frankly, I see no reason why you would want additional time before oral argument on those issues.

Of course, I see that you would want additional time on the other issues, but one hour would not be adequate for that argument.

Now, Judge McCord and Judge Kennamer, in addition to being concerned about their own availability, are concerned about bringing back so many lawyers for another hearing, and we are also concerned about the fact that one of the parties in the case is embarrassed by the fact that the Chief Counsel is not here. We are concerned about that, and talked about it.

There should be a balance of convenience, however, we feel, and unless there is some serious objection we would like very much for you gentlemen to agree to take an hour for the Plaintiffs and those on the side of the Plaintiffs, and an hour for the Defendants and those on that side, and let you argue that matter; and then give you a period of ten days within which to file briefs and five days thereafter within which to file reply briefs.

If there is a valid, serious objection, we would like to hear it and pass on it at this time.

Mr. Baker: On behalf of my Association and those who I represent individually we feel compelled by the logic of that. [fol. 428] We have no desire to argue this matter. We feel we can reduce to brief and reply anything we want to say. We do not feel an argument is necessary, and we, therefore, waive any opportunity for oral argument at all, either today or later.

Mr. Wells: The suggested procedure is entirely satisfactory to the clients I represent.

Judge Lynne: Mr. Idol, you represent the original Plaintiffs.

Mr. Idol: That's right, the American Trucking Association, and that procedure is highly satisfactory to us.

Judge Lynne: Would you like to argue the matter orally today?

Mr. Idol: Yes, sir, I would like to.

Judge Lynne: Mr. Howell, you represent the original Defendants. Would you like to argue it orally?

Mr. Howell: It would be very convenient for us, if it would mean we would not have to come back for an argu-

ment later on, because we are quite busy. If we could dispose of that today, it would be a convenience.

Judge Lynne: And you would like to make an oral argument?

Mr. Idol: Yes, sir, if the other gentlemen are willing to that, I am certainly in favor of it.

Judge Lynne: How many of the Intervenors would like to participate in the oral argument?

Mr. Johnston: The railroads would like to participate. [fol. 429] Judge Lynne: Maybe after you hear the arguments you might not want to add anything to it. That we don't know, but we do want to place a time limit on the arguments.

Mr. Burchmore: I would like to speak two or three minutes only in explanation.

Mr. Cockrum: Following Mr. Idol, the Secretary of Agriculture might or might not desire a few minutes.

(A conference was held off the record.)

Mr. Idol: Your Honor, I stated a moment ago that I desired definitely to argue the matter before you today. I would like to correct that statement. We are willing to submit the case on brief without argument, provided the Defendants and the Intervening Defendants are willing to do the same.

Judge Lynne: I don't believe oral arguments are going to help this court a whole lot, to be perfectly frank with you. This court recognizes the critical importance of this case, we think that it is probably the most important case from the implications of the case, economic and otherwise, that this court has heard since the Ashwander case, the Tennessee Valley Authority case. That means we are going to have to labor, we know that, and oral arguments today are not going to help us materially when we dig into it. That is my frank appraisal. I don't want to deprive anybody of the right to argue, however.

Mr. Seaks: I don't want to be slower than my colleagues. Ten days is a little bit short. Will everybody else be ready [fol. 430] in ten days?

Mr. Johnston: Two weeks, as I understand it.

Judge McCord: Two weeks is right. I said fifteen days.

Mr. Johnston: As to the question of reply brief, will

you make it clear as to whether we have the opportunity to file reply briefs?

Judge Lynne: My suggestion was ten days, with five days additional for reply briefs. I am not wedded to it.

Mr. Burchmore: Mails and all are slow. Would your Honor make that fifteen days for the direct briefs, although mine is ready, and ten days for a reply?

Mr. Johnston: We have also printer problems. It is not only a matter of the mails, but the printers are loaded, and we would probably want to print our briefs. In that case I think fifteen plus ten would be a safer suggestion.

Judge Lynne: All we want to do is to decide the case within the compliance date, and we will do that. I am perfectly willing for myself, and I know I speak for Judge McCord and Judge Kennamer, if you gentlemen want fifteen days for your direct briefs and ten days additional for your reply briefs, that's all right. And there is no rule of this court that requires the printing of briefs.

Mr. Johnston: Then ten days is satisfactory to us.

Judge Lynne: Of course, we would rather have them printed, but we certainly don't insist on it. We have no [fol. 431] rule at all about the printing of briefs in this court.

Let me dictate a stipulation for the record and then find out whether there is any disagreement.

This case coming on to be heard, it was stipulated by and on behalf of all original parties Plaintiff, the original parties Defendant except the United States of America, and all intervening parties,——

First. That this action be and the same is submitted for final judgment on Plaintiffs prayer for a final injunction; that such submission shall be on the pleadings and on the proof; that all parties be and they are hereby granted fifteen days from and after this date within which to file original briefs; and are granted ten days from and after the expiration of such fifteen day period within which they might file reply briefs.

Is there any objection to that stipulation?

Mr. Idol: We have no objection to the time or any other circumstance, except for the fact that those plus days will bring us up pretty close to December 1, the current effective

date of the order. We are prepared to present testimony on the question of irreparable damage today. I think that if that much time is allowed, perhaps you should permit us to present the testimony and hold your action under advisement for the purpose of issuing an interlocutory injunction if that becomes necessary.

[fol. 432] Judge Lynne: Mr. Howell, could you speak for the Commission? In the event this court is unable to agree to a judgment on December 1, what would be the likelihood of a suspension of the compliance date for say fifteen days, so that this court's judgment might be entered before the compliance is required under the rules?

Mr. Howell: The Commission has always been very generous in the matter of extending the effective date of its orders, particularly when a court requests it. I don't think they ever deny it, if it is for the court's convenience. I don't know anything that would take it out of the usual rule. I couldn't guarantee that, but I think that is the case.

Judge Lynne: As I understand it, I think if we ran right up to the deadline that we would be inclined to grant a temporary restraining order,—couldn't we, until we had a chance to rule on the case?

Mr. Howell: It would not be necessary to do that, but just ask the Commission, or tell the Commission how much more time you need, and I am sure they will extend the effective date.

Mr. Helmetag: They have already done it twice in this case.

Judge Lynne: We will do that.

Mr. Idol: Under those circumstances it is perfectly satisfactory, the stipulation is, to the Plaintiffs. We have the record, certified by the Secretary, available here. I [fol. 433] should like to move that be received in evidence.

Judge Lynne: That will be received as Plaintiffs' Exhibit 1.

Mr. Johnston: I take it that is what the court meant in the submission, by saying that the case was submitted on the proof and the record.

Judge Lynne: Certainly.

Judge McCord: I suggest you let this run up to the first of January. We have to study this, and I would like a little more time to be reading all of these briefs. I think it will take us to the first of January. I would like to have that much time. This is an important case to the whole nation, gentlemen.

Judge Lynne: I think that with Mr. Howell's statement, —after we get the briefs in, that they will be reasonable about it. I am sure that they will be.

Mr. Johnston: Might I ask, if that about winds the thing up, if the Reporter could give us a list of the names and addresses of all counsel involved, so that these briefs can be exchanged properly.

Judge McCord: That is a timely suggestion.

Judge Lynne: Will each one of you, before you leave here, write on a piece of paper your name, the name of your firm, and address, and hand it to the Court Reporter?

I assume nobody else wants to offer any evidence other [fol. 434] than the record before the Commission.

(No response.)

Mr. McCord: You announced initially that all motions to intervene had been granted.

Judge Lynne: Yes.

Mr. McCord: I didn't know whether a specific order had been made allowing our intervention or not. I brought one with me.

Judge Lynne: That is the Florida Railroad——

Mr. McCord: The Florida Railroad & Public Utilities Commission.

Judge Lynne: Do you have a pending motion?

Mr. McCord: Yes, sir, we filed a motion.

Judge Lynne: On the 17th day of October I signed and entered that order, which I had my law clerk draw. That was signed on October 17.

Mr. McCord: Thank you.

Judge Lynne: We will be very liberal, I am sure, in allowing any intervention up until the time of the judgment of this court, if any other Intervenors desire to intervene.

Judge McCord: If there is nothing else before the court, we are going to recess until further order.

[fols. 435-444] [Reporter's Certificate to foregoing transcript omitted in printing.]

[fol. 445] IN UNITED STATES DISTRICT COURT

Civil Action No. 6758

AMERICAN TRUCKING ASSOCIATIONS, INC., et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

OPINION—Filed December 14, 1951

Before McCord, Circuit Judge, and Kennamer and Lynne, District Judges

LYNNE, District Judge:

Invoking the jurisdiction of this duly constituted district court of three judges pursuant to the provisions of 28 U. S. C. A. Sections 1336, 1398, 2284, and 2321 to 2325, plaintiffs,[1] consisting of three associations of truckers together with fourteen motor common carrier corporations,

[1] Intervening as of right and ranged in support of plaintiffs were: Florida Citrus Commission and Growers & Shippers League of Florida; Secretary of Agriculture of the United States; Florida Railroad & Public Utilities Commission; Secretary of the National League of Wholesale Fresh Fruit and Vegetable Distributors; The National Industrial Traffic League; and, L. R. Burnham, B. Emerita Reese, B. LeRoy Burnham, and Otis B. Burnham, co-partners d/b/a Burnham's Van Service. An Amicus Curiae brief in support of plaintiffs' position by leave of court was filed by Southeastern Association of Railroad and Utilities Commissioners.

instituted this action to enjoin, set aside or an annul an order of defendant,[2] Interstate Commerce Commission (hereinafter referred to as the Commission), entered May 8, 1951.[3]

[fol. 446] By the order complained of the Commission undertook to prescribe rules governing the practices of authorized carriers of property by motor vehicle in interstate or foreign commerce in the augmentation and interchange of equipment and the rental of vehicles or equipment to private carriers or shippers.[4]

---

[2] In view of the attitude of the Secretary of Agriculture, the Attorney General elected not to enter an appearance for the United States, a defendant and necessary party. Intervenors who submitted briefs supporting the Commission were: Class I Railroads; International Brotherhood of Teamsters-Chauffeurs-Warehousemen and Helpers of America; Contract Carriers Conference of American Trucking Associations. An Amicus Curiae brief in support of the Commission by leave of court was filed by the State of Washington.

[3] "Lease and Interchange of Vehicles by Motor Carriers, Ex Parte No. MC-43."

[4] The rules adopted by the entire Commission appear in Appendix E, Exhibit C to the original complaint beginning at page 184. They are liberally summarized as follows:

Section 207.2 contains definitions of terms.

Section 207.3 exempts from the rules the following equipment, except as to requirements relative to inspections and identification of equipment; (a) equipment leased by one authorized carrier, operating over routes or within territories, to another such carrier and operated between points and over routes which both lessor and lessee are authorized to serve; (b) equipment used in transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between railroad stations on railroad billing; (c) equipment utilized in transportation performed solely and exclusively within any municipality, contiguous municipalities, or commercial zones; (d) equipment utilized by an authorized carrier in transportation performed pursuant to any plan of operation approved

On its own motion by order dated January 9, 1948, the Commission instituted an investigation into the lawfulness of the practices of the motor common and contract carriers [fol. 447] subject to its jurisdiction respecting: the performance by such carriers of transportation with vehicles owned by others; the interchange of vehicles between such

---

by the Commission under Section 5 of the Interstate Commerce Act; (e) equipment without drivers leased by an authorized carrier from an individual, partnership or corporation whose principal business is leasing equipment without drivers for compensation.

Section 207.4 prescribes rules for augmenting equipment, other than equipment used in interchange service, and provides (a) that authorized carriers may perform transportation in or with equipment which they do not own, provided: (1) it be under a contract or lease, made between the authorized carrier and owner of the equipment; (2) shall be in writing and signed by the parties; and (3) specify the period for which it applies, not less than 30 days, provided, further, that for 6 months from the date the rules became effective, equipment utilized in carrying livestock, fish, or agricultural commodities may be utilized by authorized carriers under contracts, leases, or other arrangements applying for less than 30 days; provided the equipment is being returned over reasonably direct routes from the destination of the shipments; (4) that the contract or lease provides for the exclusive possession, control and use of the equipment and for the complete assumption of responsibility in respect thereto by the authorized carrier, and the equipment may not be further leased for such duration.

Section 207.4.(a) (5) The lease shall specify the compensation to be paid by the lessee which shall not be computed on the basis of any division or percentage of any rate on the commodities transported or on the percentage of revenue earned by the vehicle; (6) it shall specify the time and date on which the agreement begins and terminates; (7) the lease shall be executed in triplicate, a copy to be carried on the equipment during the period of the lease unless a certificate be carried, certifying the fact of operation, name of owner, dates of lease and period thereof, restric-

carriers; and the lease of vehicles by such carriers either with or without drivers to private motor carriers and shippers. All motor common and contract carriers subject to the Commission's jurisdiction were made respondents. Upon each of them was served a copy of such order containing an appendix in which was set forth rules and regu-

---

tions on commodities; (b) when possession of equipment is taken by the authorized carrier he shall give a receipt to the owner thereof specifically identifying it and stating the precise time of taking possession and a similar receipt is to be given by the owner to the lessee when the vehicle is returned; (c) before taking possession the lessee, or qualified inspector acting for him, must inspect the vehicle and furnish the report required by this rule, in order to insure that the safety requirements of the Commission's Motor Carrier Safety Regulations be complied with.

Section 207.4.(d) The carrier acquiring the use of the equipment shall properly and correctly identify such equipment as being operated for and by it in accordance with the Commission's requirements for identification of motor carrier vehicles, and removable devices may be used but (1) any such identification must be removed by lessee before returning vehicle to lessor; (2) unless a copy of the lease is carried on the vehicle a certificate must be carried certifying that it is leased, showing date of lease and period thereof, any restrictions of carriage, the location where the original lease is kept; (e) before any person other than a regular employee of authorized carrier is assigned to drive the equipment, the carrier must make certain the driver is familiar with the Commission's safety regulations; that a certificate of physical examination of the driver has been furnished; that the carrier leasing the equipment shall prepare and keep a manifest covering each trip for which the equipment is used in its service; (f) manifests and billing must be carried on the vehicle and copies thereof preserved.

Section 207.5 permits the interchange of equipment, by contract, lease, or other arrangement, between common carriers of property in connection with any through movement of traffic under the conditions: (a) that the agreement shall specifically describe the equipment, the points of inter-

lations in tentative form and substance, compiled by the [fol. 448] Commission's Bureau of Motor Carriers. In addition, copies thereof were published in the Federal Register and in the office of the Secretary of the Commission.

Hearings before Examiner Henry C. Lawton, to whom the matter was assigned, occupied nineteen days between October 14, 1948, and January 27, 1949. Eighty witnesses testified. Interested participants, represented by able counsel, exhibited throughout an understandable zeal and partisanship responsible for the compilation of a record consisting of 3,640 pages of testimony and 120 exhibits.

Proceeding to an analysis of the evidence and the positions of the parties, the Examiner found that the leasing

---

change, the use to be made of the equipment and the consideration; (b) that the operating authority held by the parties to the interchange arrangements must authorize the transportation involved; (c) that each carrier must assign its own driver to operate the equipment interchanged; (d) that the traffic transported must move on through bills of lading, and the rates and revenues collected must be accounted for in the same manner if there had been no interchange and that charges for use of the equipment must be kept separate from the division of the rates; (e) that the carrier acquiring the use of the equipment to inspect same and see that it meets the standards of safety required by these rules; (f) that a copy of the agreement of interchange shall be carried on the vehicle so operated in interchange service.

Section 207.6.(a) Rental of equipment by authorized carriers to noncarriers is prohibited unless such service is authorized by the carriers' operating authority; (b) also authorized common carriers shall not rent equipment, without drivers, to noncarriers.

It is to be noted that trip leasing is not prohibited entirely by the Commission's rules. It is permissible under the rules for authorized carriers to (1) trip lease each other's equipment; and (2) trip lease equipment from owner-operators, private carriers and exempt carriers, provided the authorized carriers furnish their own drivers to drive the equipment leased.

and interchange practices of motor carriers have resulted in widespread and flagrant violations of the Act and the Commission's regulations [5] and concluded that the Com-

[5] The Examiner's Proposed Report, a part of the record in this case—see *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 71 S. Ct. 456 (1951)—sets forth the need for regulation on Sheets 54 to 57, inclusive, as follows:

"The evidence herein, just received, is replete with examples of violations of the Interstate Commerce Act and the Commission's regulations thereunder in the present practices of the motor carriers in leasing equipment." (Sheet 54)

"Violations of the Act, aside from violations of the Commission regulations, occur under the guise of leasing, and are committed both by owner-operators and authorized carriers. There are frequent instances of record, where one of the former transported a shipment beyond the territory of the carrier under whose authority he had been hauling, and later attempted to have the unlawful transportation validated by a trip-lease." (Sheet 54)

"Authorized carriers violate the Act by permitting other authorized carriers to run over their routes or operate in their authorized territories under the guise of leasing, when, as a matter of fact, no lease is entered into, and the ostensible lessee-carrier is merely accepting a small percent of the revenue for the privilege of allowing the purported lessor-carrier to operate over the lessee-carrier's route, or in the latter's territory, *without the approval of the Commission.*" (Sheet 55—Emphasis supplied)

"Perhaps in no other proceeding in which practices of motor carriers have been under investigation, has there been such a general admission by all parties, including those opposed to regulation, that violations of law and the Commission's regulations exist." (Sheet 56)

"The record warrants the conclusion that the leasing practices of the motor carriers permit violations of the Act, and the Commission's regulations thereunder, and that it is necessary that such practices be subjected to regulation." (Sheet 57)

mission had the statutory power to and should promulgate a new set of rules and regulations to cope with the situa- [fol. 449] tion. On August 26, 1949, he filed a Recommended Report diagnosing the ills and suggesting the remedies.[6]

Salient and most controversial features of the Examiner's proposals centered around his Rule II, providing that carriers augmenting their fleets with leased vehicles would be required to have written leases of at least thirty days' duration; that vehicles be driven by employes of the carrier; and that the compensation paid for the use of such vehicles be computed upon some basis other than a percentage of the revenues received for transporting commodities in the leased equipment. Rules preventing the carriers from leasing vehicles with drivers to shippers and requiring carriers to use their own employes to operate interchanged equipment were also included.

In the numerous exceptions to the Examiner's Proposed Report filed in behalf of the motor carrier parties the predominant note is negation of the Commission's authority to prescribe such rules. Expressions of dissatisfaction, disassociated from the question of statutory power, indicate an inability on the part of the affected carriers to agree among themselves as to the means which should be adopted to end the law evading practices existing in their industry. Some were apparently out of sympathy with the Examiner's views that the Commission should implement its regulatory efforts by clear and concise rules relating leasing and interchange practices to their proper function in the transportation field; others felt less stringent regulations could be evolved which could deal effectively with the situation without disturbing existing leasing arrangements.

On June 26, 1950, Division 5 of the Commission filed a Report and Order establishing rules and regulations governing the leasing and interchanging of motor vehicles by

---

[6] The Examiner's proposed rules and regulations are Appendix B of the Report of the Commission, 52 MCC 675 (1951).

the authorized motor carriers.[7] Somewhat less restrictive than those proposed by the Examiner, they omitted the two polemical features of the latter, namely that the leases of owner-operator vehicles be of at least thirty days' duration [fol. 450] and that the rental paid for leased vehicles be other than a percentage of the revenues received for transporting the commodities in leased equipment. In their report the members of Division 5 made it clear that they entertained no doubts as to the statutory authority of the Commission to regulate the leasing and interchange practices of motor carriers.[8]

Thereafter, upon consideration of the several Petitions for Reconsideration, oral arguments were heard by the entire Commission on October 30-31, 1950, in which counsel for the interested parties fully explored the authority of the Commission and the factual basis for the proposed rules.

On May 8, 1951, the Commission issued a Report and Order substantially modifying the action of Division 5. The rules and regulations prescribed by the entire Commission[9] virtually accepted the Examiner's proposals. While not requiring the motor carriers to use their own employes on leased equipment, Rule 207.4(a) (3) provides that leases of vehicles to be driven by the owners thereof shall be of at least thirty days' duration. Rule 207.4(a) (5) provides that the compensation for leased vehicles shall not be computed on the basis of any division or percentage of the rates received for transporting commodities in leased equipment. Rule 207.5(c) provides that where equipment is interchanged among carriers, each carrier must assign its own employe to operate the equipment while it is being run over the particular carrier's route. The remaining provisions of the rules merely implement the foregoing which are the heart of the regulatory scheme devised by the Commission.

---

[7] These rules and regulations are found in Appendix A of the Commission's Report, 52 MCC 675.

[8] Report of Division 5, 51 MCC 461, 514-526.

[9] Appendix E to the Report: Lease and Interchange of Vehicles by Motor Carriers, 52 MCC 675 (1951), at pages 743-748.

Before resorting to this court plaintiffs exhausted their administrative remedies by petitions for reconsideration of the Commission's order, which by its terms was to have become effective August 1, 1951. Intervening orders have postponed the compliance date to February 1, 1952.

The antecedent history of conditions existing in that area of the total transportation system of this nation occupied by motor carriers illumines the proceedings before the [fol. 451] Commission, to which we have adverted. The prevalence of practices thought to be inimical alike to the public safety and economy was brought to the attention of the Congress by the Federal Coordinator of Transportation in a report submitted in March, 1934,[10] to which was attached a proposed bill bearing the indorsement of the Commission as "imperatively necessary under present conditions." Fundamentally, the conditions to which the Coordinator referred under the descriptive term, "brokerage proposition" are identical with those described by the Commission as "the leasing problem" in its report of May 8, 1951.[11]

In 1935 the Congress enacted the Motor Carrier Act and made it Part II of the Interstate Commerce Act.[12] This Act provides a design of regulation for the motor carrier industry analagous to that applicable to the railroad industry since the passage of the Act to Regulate Commerce in 1887.[13] In brief, it drew within the orbit of federal control a family of regulated carriers of two principal types, motor common carriers offering service to the public generally,

---

[10] "Regulation of Transportation Agencies." S. Doc. 152, 73rd Cong., 2d Sess., page 14, et seq.

[11] Lease and Interchange of Vehicles by Motor Carriers, 52 MCC 675 (1951), at pages 677-682.

[12] Act of August 9, 1935. 49 Stat. 543, as amended by the Act of September 18, 1940, 54 Stat. 919, 49 U. S. C. A. 301, et seq.

[13] Act of February 4, 1887, 24 Stat. 379, which by the passage of the transportation Act of 1920, Act of February 28, 1920, 41 Stat. 456, became the Interstate Commerce Act, 49 U. S. C. A. 27, et seq.

and motor contract carriers furnishing service to a limited group of shippers on a contractual basis as contrasted with schedules of rates equally available to all shippers.

Within the regulated group of carriers competition is limited by the requirements of Sections 207 and 209 that motor common carriers obtain certificates of convenience and necessity, and that motor contract carriers obtain permits upon proof that their proposed operations will be consistent with the public interest. For both groups of regulated carriers the certificate and permit requirements provide protection from an oversupply of transportation facilities that would weaken and undermine sound economic conditions in the field of transportation. But in return for working in a field of protected competition, these car- [fol. 452] riers have assumed certain responsibilities. The responsibilities include, in the case of common carriers, the obligation to render service to the public, the obligation to maintain reasonable rates, and the obligation to confine operations to a prescribed territory or set of routes. The responsibilities of the motor contract carriers are somewhat less stringent, for their pricing systems are less restricted and their obligations to provide non-discriminatory service less onerous, but by accepting the status they give up the right to hold out their services to the public generally. In addition, the regulated carriers are subject to the powers of the Commission to establish and enforce safety rules and regulations.

For reasons deemed sufficient by the Congress and which are not open to question here, the Motor Carrier Act excluded from economic regulation a considerable number of motor trucking operations, some of a wholly public, others of an essentially private nature. Section 203 of the Act contains an extensive list of trucking operations that fall outside of the field of economic regulation and only come under the Commission's jurisdiction in regard to safety of operation. Included in these exceptions, for example, are vehicles used in hauling agricultural commodities, livestock, and fish; vehicles used within city limits or the commercial zones of metropolitan cities; and motor vehicles used in purely private carriage.

It is a matter of common knowledge that whether the

trucking operation is within or without the orbit of economic regulation, the vehicles used are not substantially different. The trucker hauling oranges from Florida to New York City—an operation exempt from economic regulation—or the manufacturing company hauling its own products from the place of manufacture to the consumers—which is excepted private carriage—use motor vehicles substantially equivalent to those used by companies operating within the sphere of regulated transportation. Since there is no limit on the number of truckers who may engage in exempt operations and no economic regulation of private carriage, the number of vehicles used in operations outside of regulation far exceeds those used in regulated transportation.

[fol. 453] The record demonstrates that the leasing practices of authorized carriers have presented difficult and complex problems from the very inception of regulation. Convenient access to an abundant supply of equipment exempt while in the exclusive use of the owners has encouraged regulated carriers to make use of such equipment to perform their normal transportation functions, under arrangements which vary as widely as the possibilities of men to agree upon means and methods of acting together.

Complaints emanating from within the industry itself, recurring frequently throughout the proceedings of record, indicate the prevalence of a practice on the part of certificated carriers to obtain traffic, shop around for a truck owner who would handle all of the transportation in his own vehicle, and retain a portion of the revenues received from the shipper as a reward for procuring the business. The owner of the rented truck, holding neither certificate nor permit and being exempt from regulation, would thus perform the essential transportation services of the regulated carrier. In many instances such leases have been but for a single trip so that when the trucker reached his destination and accomplished delivery he reverted to his original status and either returned empty or hired himself and his truck to another carrier for a return load. Because of the attractiveness of the transportation industry and the difficulty of obtaining certificates and permits, increasingly large numbers of independent truckers became avail-

able to the regulated carriers on a per-trip basis. Impetus was imparted to this trend when servicemen returning from the recent war were enabled by governmental aid easily to procure motor vehicle equipment.

Thus there has evolved a large group of "owner-operators," sometimes referred to as "gypsies,"[14] who move into and out of the orbit of regulated transportation by some type of lease arrangement with authorized carriers. Often unknown individually to the Commission, they perform the essential operations of regulated carriers on a trip [fol. 454] basis, regardless of their fitness and ability to meet the Commission's standards for certification, regardless of whether there is a public need for the operation, and regardless of the resultant distortion of operating ratio which obviously has an adverse competitive impact on the authorized carriers.

Certain practices of carriers in interchanging equipment among themselves claimed the attention of the Commission. It appears from the record that a prevalent usage in the industry is for a carrier having authority to handle traffic between two cities to contract for a shipment to points beyond its authorized territory. In lieu of giving the traffic to another carrier to move to destination, the first carrier will secure the right to operate over the second carrier's route upon the payment of a flat charge. This practice is tantamount to a leasing by the second carrier of its operating rights to the first carrier without the Commission's approval as required by Section 212(b) of the Act.

To a lesser extent authorized carriers have sometimes avoided the limitations of their certificates by leasing their equipment with drivers to shippers; thus permitting the

---

[14] "Gypsies" is not used here as a term of opprobrium, for the record pictures them as more sinned against than sinning. In the Commission's report (p. 678) they are defined as "roving owner-operators" or itinerant truckers, who select heavy loading, high revenue freight to handle, and who "are not interested in less-than-truckload traffic because of the time consumed in handling it, and the cost of loading and unloading it."

carriers to haul the shipper's traffic to points beyond their authorized territories.

The result of the employment of these three devices has been to enfeeble the Commission in its effort to control the motor carrier industry. As a consequence, the entire scheme of economic and safety regulation of the transportation services of the nation has been imperiled.

Cognizance of the foregoing trends and tendencies was taken by the Commission's Bureau of Motor Carriers in the early days of regulation. On August 19, 1936, the Bureau issued its Administrative Ruling No. 4.[15] The relaxation of this rule, which, though never officially adopted by the Commission, might have been an effective curb upon [fol. 455] evasive practices, was apparently due to the results of cases, dealing with the "grandfather clause" wherein parties were litigating with respect to "grandfather rights."[16] Be that as it may, the rule obtaining before the promulgation of the regulations in question was that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the services to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public and the Commission for the transportation.[17]

---

[15] "The lease or other arrangement by which the equipment of an authorized operator is augmented must be of such a character that the possession and control of the vehicle is, for the period of the lease, entirely vested in the authorized operator in such a way as to be good against the world, including the lessor; that the operation thereof must be conducted under the supervision and control of such carrier; that the vehicles must be operated by persons who are employees of the authorized operator, that is to say, who stand in the relation of servant to him as master."

[16] See, e.g., *Acme Fast Freight, Inc.* v. *United States*, 309 U. S. 638, affirming, *per curiam*, 30 F. Supp. 968 (S. D. N. Y., 1940); *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50 (1942); *Thomson* v. *United States*, 321 U. S. 19 (1944).

[17] 52 MCC 675 (1951), at page 679. cf: Dixie Ohio Exp. Co. Common Carrier Application 17 MCC 735.

As early as 1940 the Bureau of Motor Carriers, recognizing the inefficacy of existing rules and regulations to eliminate or mitigate violations accomplished by means of false, fraudulent or fictitious leases devised for the purpose of circumventing the Act, began a study of the leasing practices of authorized carriers.[18] Interrupted by the exigencies of the late war, it continued and became the basis for the proceedings now under review.

That the seriousness of the problem relating to the leasing and interchange of equipment is not a figment of bureaucratic imagination is attested by the fact that plaintiff, American Trucking Associations, Inc., the national organization of the trucking industry, submitted rules which it considered appropriate as corrective measures and which are included in Appendix C, Exhibit C to the complaint. Moreover, the record makes it clear that a substantial segment of the motor carrier industry recognizes the imperative need for a regulation of such practices.

The judicial process is not designed to function in a vacuum and the laborious review we have accorded to the voluminous record and its exhibits has served to clarify, [fol. 456] not to becloud, the issues upon which the main battle-line is to be drawn. The springboard from which we launch our inquiry is the basic contention of plaintiffs that the rules and regulations of which complaint is made were beyond the statutory jurisdiction of the Commission. It is at once apparent that a conclusion of lack of authority would put an end to the controversy.

It is not pretended that the Commission is possessed of any power apart from that which is conferred upon it expressly or by necessary implication by the statute of which it is the creature. Our function is to interpret the statute and construe its language so as to give effect to the intent of Congress without a perconceived notion that the particular power asserted should have been either

[18] A discussion of the efforts of the Bureau to regulate the leasing of vehicles by authorized carriers and an analysis of relevant statistical data compiled on the eve of the proceedings before the Commission is contained in the latter's report: 52 MCC 675 (1951), beginning at page 682.

granted or withheld. Mr. Justice Reed, writing for the Court in *United States* v. *American Trucking Associations*, 310 U. S. 534, a case involving the Motor Carrier Act, 1935, precisely stated the function of the courts in statutory construction.[19]

---

[19] "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many need- of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the m-aning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies

[fol. 457] Starting with the premise that the Interstate Commerce Act of 1940, enunciating a National Transportation Policy,[20] was intended to expand the statutory jurisdiction of the Commission, we enter upon a consideration of those clauses and sections of Part II of the Act wherein

---

an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'"

[20] Act Sept. 18, 1940, C. 722, Title I, Sec. 1, 54 Stat. 899, amended the Interstate Commerce Act by inserting before Part I thereof (49 U. S. C. A. 1) the following provision entitled "National Transportation Policy":

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

the power to establish the rules and regulations in contro-
[fol. 458] versy is supposed to have been conferred. Sanction for this method of analytical approach is found in the following paragraph from the opinion of the Court in *United States* v. *Pennsylvania Railroad Co.*, 323 U. S. 612, at page 616:

> "The 1940 Transportation Act is divided into three parts, the first relating to railroads, the second to motor vehicles, and the third to water carriers. That Act, as had each previous amendment of the original 1887 Act, expanded the scope of regulation in this field and correlatively broadened the Commission's powers. The interrelationship of the three parts of the Act was made Manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' The declared objective was that of 'developing, coordinating, and preserving a national transportation system by water, highway, and rail, . . . adequate to meet the needs of the commerce of the United States . . .' Congress further admonished that 'all of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.' 54 Stat. 899."

Integrating the functions of transporting persons and property by rail, by road and by water into a mosaic of great complexity and infinite variety, the Congress in broad and sweeping terms committed its regulation to the Commission, which had for half a century exhibited both fidelity and skill in this rapidly expanding field of industrial adventure. Without changes relevant here the provisions of the Motor Carrier Act fell into place as Part II of the new Act.

Against the backdrop of the clearly expressed intent of the Congress the following provisions of the 1940 Transportation Act emerge full-bodied and pregnant with meaning:

> Section 202(a): The provisions of this chapter apply to the transportation of passengers or property by

motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is vested in the Interstate Commerce Commission.

[fol. 459] Section 203(a)(19): The "services" and "transportation" to which this chapter applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers, and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

Section 204(a)(1) and (2): It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

It is readily apparent that the Commission's power to prescribe rules and regulations for controlling the leasing practices of motor carriers is not spelled out in the foregoing provisions of the Act. Nor may such authority be found in the precise enumeration of duties especially enjoined upon the Commission by the entire Section 204 of the Act. From this it is argued that the asserted jurisdiction is non-existent. This device of strict construc-

tion, proceeding from a misapplication of the maxim, *expressio unius est exclusio alterius*, would sterilize a statute of less magnificent proportions, and its fallacy was clearly demonstrated in *United States* v. *Pennsylvania Railroad Co., supra,* as follows:

> "There is no language in the present Act which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the Congressional purpose to foster an efficient and fair national transportation system. Cf. *Chicago, R. I. & P. R. Co.* v. *United States*, 274 U. S. 29, 36; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 4373, 376-377."

[fol. 460] Authority of the Commission to regulate interchange practices of motor carriers is necessarily implied from the provisions of Section 216(c) of the Act:

> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and

> just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

It seems clear that the privilege of participating in through routes and joint rates begets the obligation to conduct a bona fide interchange arrangement and not to lease each other's rights without the Commission's approval.

But it is insisted that regardless of language found elsewhere in the Act any grant of power supporting the Commission's rules relating to leasing and interchange is expressly delimited by the following common provisions of Sections 208(a) and 209(b):

> "That no terms, conditions or limitations shall restrict the right of a carrier to add to his or its equipment and facilities over the routes, * * * (within the scope of the permit or within the territory specified in the certificate) * * * as the development of the business and the demand of the public shall require."

This language, it is said, is clearly expressive of a Congressional intent to deny to the Commission authority in any way to restrict or control the manner in which motor carriers augment their equipment. Lifted from the context in which they appear, these words at best lend but plausible support to plaintiffs' argument. Their introduction into the section through the medium of a proviso presupposes a preceding grant of power which they were intended to limit. In other words, but for the language of the provisory clauses, Sections 208(a) and 209(b) clearly enable the Commission to regulate the manner in which such carriers add to their equipment.

[fol. 461] Writing for a three-judge court in *Crescent Express Lines, Inc.* v. *United States*, 49 F. Supp. 92, at page 94, L. Hand, Circuit Judge, observed:

> "Thus it appears, not only because the certificate is to 'specify the service to be rendered' as well as the routes over which it shall be rendered, but also because that service is to be always subject to regulation in

the interests of the public, that Sec. 308(a)—unless because of its proviso—leaves complete regulatory power in the Commission's hands. That proviso does, however, set a limit upon its power, and the result at bar depends upon what that is. It declares that none of the 'terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' The parties at bar appear to assume that this is more than merely a direction for the guidance of the Commission; and that, ex proprio vigore, it gives the carrier the privilege without recourse to the Commission of adding to his service as he may find it desirable to do so. That is indeed probably its true meaning; in any event we shall assume so for the purposes of this case, for in any event it must be read quantitatively."

In affirming the lower Court, the Supreme Court, in *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401, at page 409, agreed with the Commission:

"* * * that the proviso is a prohibition against a limitation on the addition of more vehicles of the authorized type, not a prohibition of the specification of the type. * * *

"We are of the view that the power of the Commission to limit the Certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act."

Reading the proviso quantitatively, we turn to the rules [21] to determine whether the Commission has transgressed the limits of the prohibition. While they are forbidden to continue the practice of leasing both truck and driver on a per trip basis, carriers may still:

(a) Lease all of the equipment they want without drivers from truck rental concerns. (Rule 207.2(d).)

(b) Lease from either carriers or non-carriers,

[21] These rules and regulations are found in Appendix E of the Commission's Report, 52 MCC 675 (1951) at Pages 743-748.

equipment on a short-term or trip basis without drivers.

(c) Lease equipment with drivers, where the lease extends for more than thirty days.

(d) Purchase and own all the equipment the carrier desires and either have such equipment operated by the carriers' own employes or by independent contractors.

[fol. 462] (e) Build and own all of the equipment the carrier desires and either have it operated by the carriers' own employes or by independent contractors.

It is our considered opinion that these rules are not the equivalent of a limitation on the addition of more vehicles. We pretermit any discussion of the statutory jurisdiction of the Commission to abrogate the practice of leasing and hold that it is empowered by the provisions of the Act, to which we have referred, to regulate by reasonable rules the manner in which motor carriers procure or provide by lease or interchange the equipment used by them in performing their essential transportation services.

Having disposed of the threshold contention relating to authority in the field in which it was exercised, we turn to the requirements of the Administrative Procedure Act of June 11, 1946,[22] to determine their impact upon the proceedings before the Commission and upon the ambit of judicial review of administrative actions. Because of the variant functions of governmental agencies, we deem it essential to inquire whether the Commission was engaged in "rule making," as defined by Section 2(c), or "adjudication," within the contemplation of Section 2(d) of this Act in the process of formulating the rules under review.

We are content to end our research and answer our query with the language of Justice Brandeis in delivering the opinion of the Court in *Assigned Car Cases*, 274 U. S. 564, wherein he stated at page 583:

> "The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few car-

[22] 60 Stat. 237, 5 U. S. C. A. Secs. 1001 et seq.

riers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare *New England Divisions Case*, 261 U. S. 184, 196-197; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 291. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under Secs. 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers, in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general."

[fol. 463] Embarking upon the process of "rule making" in the exercise of a quasi-legislative function, the Commission was obligated by the terms of Section 4(b) of this Act to:

> 1. Notify the public of proposed rule making by filing notice in the Federal Register which shall contain
>
> (a) The time and place of rule making *proceedings*,
>
> (b) Reference to the authority under which the rule making is proposed,
>
> (c) The substance of the proposed rules.
>
> 2. Give all parties an opportunity to present written views, arguments and data with or without the right of oral presentation;
>
> 3. Incorporate a concise general statement of the basis for the rules; and

4. Where the statute requires agency hearings before rules can be prescribed, follow the provisions of Sections 7 and 8 of the Procedure Act.

It is not seriously urged that the Commission failed to observe the first three of the above numbered requirements. But it is vigorously contended that it virtually ignored the fourth in omitting fact-findings to support its rules. The short answer to this insistence is that Part II of the Interstate Commerce Act does not require hearings in rule making proceedings.[23] The decision law of the courts in cases involving the rate making activity of the Commission[24] is inapposite because the Act clearly requires full administrative hearings in the rate making process. Nor do the statutory provisions conferring the power to make the rules under attack condition its exercise upon the existence of a factual situation which first must be deter- [fol. 464] mined.[25]

Even though we hold that the Commission was not compelled to make findings of fact before exercising its rule making power, we have not read the record in this case and the seventy-three pages of the Commission's printed report, in which it analyzed the fact situation before it, the need for regulation, and the correlation of its proposed rules to the economic and safety problems it had encountered

---

[23] While Sections 216(e) and 218(b) expressly provide that hearings must be held where the Commission is determining the legality or propriety of a motor carrier rate or charge, there is no such requirement in Section 204(6), which gives the Commission power to issue rules and regulations.

[24] e.g. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567; *State of New York, et al.* v. *United States, et al.*, 331 U. S. 284; *Tennessee Valley Authority, et al.* v. *United States, et al.*, 96 F. Supp. 409.

[25] Compare: *Alabama Great Southern Railroad Company, et al.* v. *United States, et al.*, 340 U. S. 216; *United States* v. *Baltimore & Ohio Railroad Company*, 293 U. S. 454; *State of Florida, et al.* v. *United States, et al.*, 282 U. S. 194.

within the sphere of its control, without arriving at the opinion that it went "the last mile" to satisfy rigid standards for fact findings. The courts have never exacted of it legalistic formalism in such findings, but have recognized that they may be "interwoven" with its discussion of the idence, relating it to the contentions of the parties and its own ultimate conclusions.[26]

Having concluded that in promulgating the rules in question the Commission was acting in a quasi-legislative capacity, we are instructed by the provisions of Section 10 of the Administrative Procedure Act (Title 5, U. S. C. A., Sec. 1009) that we may review its actions to determine whether the rules:

> (1) Are arbitrary, capricious or an abuse of discretion; or
>
> (2) Contrary to Constitutional rights, power, privilege or immunity; or
>
> (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
>
> (4) Were formulated without observance of procedure required by law.

We have heretofore considered and disposed of the third and fourth of the above numbered objects encompassed within the range of judicial review when other aspects of this case claimed our attention. The constitutional argu- [fol. 465] ment proceeds, on the one hand, from the premise that Part II of the Interstate Commerce Act, as we have interpreted it to confer power on the Commission to prescribe the instant rules, contravenes Article I, Section 1 of the Constitution; on the other, from the contention that the rules themselves are violative of the "due process clause" of the Fifth Amendment.

No one disputes the proposition that the Congress may not delegate to any person or group of persons its legislative power to make laws. It is equally well settled that it

---

[26] *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 428; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454; *Tennessee Valley Authority* v. *United States*, 96 F. Supp. 409.

may delegate to an administrative body authority to make regulations to fill up the details of laws of its own enactment where it has indicated its will in such statutes. *United States* v. *Grimaud*, 220 U. S. 506. The difficulty lies in stating precisely the dividing line between legislation and administration. We are intrigued by the overtones and undertones of opinions concerned with the constitutionality of uses made by the Congress of "the necessary resources of flexibility and practicality * * * to perform its function." *Currin* v. *Wallace*, 306 U. S. 1. But we are not tempted to undertake the task of reconciling the authorities against the background of the great and varying legislative experiments which provoked the several controversies with which they dealt.

One clear thread runs through the decisions which we have considered. For the purposes of this opinion it is best stated by paraphrasing the language of Chief Justice Stone in *Yakus* v. *United States*, 321 U. S. 414, at page 426:

> "Only if we could say that there is an absence of standards for the guidance of the Administrator's (Commission's) action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overruling its choice of means for effecting its declared purpose of preventing inflation" (its declared purpose to integrate and control the vast and complex transportation systems of this nation and thereby "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers."—National Transportation Policy).

We think that the standards prescribed in the statement of the National Transportation Policy are no less definite and understandable than those contained in statutory enactments upheld by the Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *National Broadcasting* [fol. 466] *Co.* v. *United States*, 319 U. S. 190; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304; *Mulford* v.

Smith, 307 U. S. 38; *Hampton & Co.* v. *United States*, 276 U. S. 394; and *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126. Compare *Schechter Corp.* v. *United States*, 295 U. S. 495; and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Therefore we hold that the delegation of power by Part II of the Interstate Commerce Act to adopt these rules did not offend Article I, Section 1 of the Constitution.

Apposite to and dispositive of the point taken in briefs by plaintiffs and intervenors that the rules themselves violate the guaranties of the Fifth Amendment is the pithy analysis of Justice Brandeis of a similar contention advanced in *Assigned Car Cases*, 274 U. S. 564, quoting from page 575:

> "There is clearly no constitutional obstacle. The rule prescribed does not involve a taking of the property of the private car owner. Congress could exclude private cars from interstate railroads. Compare *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 405-6, 411, 415. And it may prescribe conditions on which alone they may be used. See *Procter & Gamble Co.* v. *United States*, 225 U. S. 282; *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281. Limiting their use does not involve regulation of the coal mining industry. Likewise, Congress may prescribe how carrier-owned cars shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation facilities."

Remaining for our attention and adjudication is the issue posed by the question: Are the rules prescribed arbitrary, capricious or an abuse of discretion? Certain fixed principles give direction to the course of our review. A court should not set aside the Commission's orders for either of the foregoing reasons if such orders are supported by the evidence.[27] "The judicial function is exhausted when there

---

[27] *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541; *O'Keefe* v. *United States*, 240 U. S. 294; *Board of Trade of Kansas City* v. *United States*,

is found to be a rational basis for the conclusions approved by the administrative body." [28] It is the task of the Com- [fol. 467] mission and not of the courts to pass upon the weight and credibility of the evidence.[29] Moreover, there is a presumption that the Commission has properly performed its official duties and this presumption supports its acts in the absence of clear evidence to the contrary.[30]

The spirit in which the Commission moved to institute the proceedings before it on its own motion was apparently typified by the following excerpt from the testimony of the witness, W. Y. Blanning, Director of the Bureau of Motor Carriers, Interstate Commerce Commission: "The proposed drafts of regulations are designed first to stop legal things which are undesirable and also to aid in giving proof of (sic) when they are illegal." [31] To catalogue the practices of carriers of which there is substantial evidence in the record and which the Commission concluded were inimical to safe, adequate, economical and efficient transpor-

---

314 U. S. 534; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; *Alton Railroad Co.* v. *United States*, 315 U. S. 15; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515.

[28] *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

[29] *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *Loving* v. *United States*, 32 F. Supp. 464, affirmed 310 U. S. 609; *United States* v. *Carolina Freight Carriers Corp., supra; Long Transportation Co.* v. *United States*, 75 F. Supp. 915; *Hanna Furnace Corp.* v. *United States*, 53 F. Supp. 341, affirmed per curiam 323 U. S. 667.

[30] *United States* v. *Chemical Foundation*, 272 U. S. 1; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 358; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591.

[31] At page 71 of the record in this case.

tation operations [32] would be a labor of supererogation, in-
[fol. 468] volving largely a recapitulation of the Commission's discussion of the need for and the appropriate means of regulation. 52 MCC 675 et seq.

[fol. 469] We cannot say that the evidence in the record affords no rational basis for the conclusions approved by

---

[32] Typical of the problems created by the practice of trip leasing, of which there is evidentiary support and which the Commission found to exist, are:

(1) The owner-operators utilized on trip leases, after the completion of their trips are on their own and the carrier assumes no responsibility for returning them to their homes. This necessitates the owner-operator hawking his services to other carriers or engaging in illegal transportation directly with shippers. In either event there is no established pattern of operations by the owner-operator and he comes into and out of regulated transportation depending upon the desires of the authorized carriers. (Report of Commission, 52 M. C. C. 675, 690.)

(2) In many instances the owner-operator to obtain work will solicit the traffic directly from shippers and then make an arrangement with an authorized carrier in the form of a lease to use that carrier's rights to move the traffic. This is illegal, of course, but difficult to police because of the color of right given by the trip lease. (Report of Commission, 52 M. C. C. 675, 690.)

(3) The owner-operator being an independent contractor is not under the full control of the carrier, and the carrier's responsibilities to the shippers are therefore transferred to those outside of regulation. (Report of the Commission, 52 M. C. C. 675, 690.)

(4) The owner-operator being an independent businessman must keep his equipment rolling to make a living. This economic necessity has resulted in excessive violations of the Commission's safety regulations, particularly the Hours of Service Rules. (Report of Commission 52 M. C. C. 675, 691, 694.)

(5) The carriers using owner-operators on a trip lease basis having only a short relationship with the owner-operators are lax in inspecting the owner-operators' vehicles

the Commission, or that the rules promulgated by it are neither appropriate nor plainly adapted to carry out the [fol. 470] Congressional intent expressed in the National Transportation Policy. There is no merit in the argument that such rules are unreasonable because they prescribe absolute uniformity with respect to carriers to which they

---

and the records of the owner-operators. (Report of Division 5, 51 M. C. C. 461, 472.)

(6) The carriers using owner-operator vehicles on a trip lease basis generally pay for such vehicles by dividing the revenues received from the shipper on a percentage basis with the owner-operators. This is not only illegal since it amounts to a division of rates between a carrier and a non-carrier (Report of Division 5, 51 M. C. C. 461, 472) but gives a carrier availing itself of this method of payment a tremendous economic advantage. The owner-operator who takes a percentage of the revenue only wants the traffic that pays high revenues, that is the better type of truckload merchandise traffic. Carriers depending on owner-operators therefore must concentrate on the better traffic, leaving the less desirable traffic to those carriers who own their own fleets and who must handle all types of traffic to secure the necessary volume to keep their equipment in use. Since the carriers using owner-operators concentrate on truckload traffic, their rates are lower than the carriers having large owned fleets who need relatively high truckload rates to provide adequate revenues to take care of the poorer paying less-truckload traffic. (Report of Commission, 52 M. C. C. 675, 693.) It is clear that the use of owner-operators distorts the carriers' operating statistics because many of the motor carrier expenses are borne by the owner-operators. Use of the operating statistics of carriers having extensive operations in leased equipment in rate cases is impossible. (Report of Commission, 52 M. C. C. 675, 693.)

(7) The use of owner-operators on a trip lease basis has resulted in the certificated carriers transferring their carrier responsibilities to those outside of regulation and relegated the carriers to mere brokers of transportation. (Report of Division 5, 51 M. C. C. 461, 466.) Of course, the Commission has not certificated the carriers as brokers, so

apply or that they are arbitrary because certain carriers are exempted from the force of their operation. It is quite clear from the record that the classifications of carriers in the exempt category are reasonable.

[fol. 471] It follows that plaintiffs and intervenors on their side of the controversy are not entitled to the relief

---

that these activities have aspects of illegality. What is worse is that the certificated carriers through the device of the trip lease "certificate" non-carriers to perform operations which by law require a certificate issued by the Commission.

(8) The abolition of the trip lease is supported by the Bureau of Motor Carriers (Report of Division 5, 51 M. C. C. 461, 468) by a considerable cross-section of the certificated common carriers, by several common carrier and contract carrier associations, by a number of state regulatory bodies, by the labor unions and by the railroads. (Report of Division 5, 51 M. C. C. 461, 468-484, inc.) Those opposing the abolition of trip leasing are largely carriers that have contributed to the break-down of regulation by the extensive use of this law evading device.

Having found that these many evils flourish because of the leasing arrangements, particularly the trip lease, the Commission determined that the solution was to abolish the trip lease so that the carriers in renting equipment would not, in effect, be leasing their certificates to non-carriers. At page 724 (52 M. C. C. 675) the Commission said:

> "We deem it necessary to exercise sufficient control over the leasing practices of these carriers (referring to certain household goods carriers) to be able to determine that a purported lease of equipment is just that, rather than an arrangement for a lease of operating rights or an extension of the same without our approval."

And at page 725:

> "We are convinced, however, that trip leasing, and especially trip leasing of equipment that is operated for the lessee by the owner, or employees of the owner,

for which they pray and that this action is due to be dismissed with prejudice. An order of dismissal will be presented and entered.

Done, this the 14th day of December, 1951.

Leon McCord, United States Circuit Judge. Charles B. Kennamer, United States District Judge. Seybourn H. Lynne, United States District Judge.

[File endorsement omitted.]

---

is inimical to sound regulation and proper administration of the provisions of Part II of the act and of our safety regulations. The rules prescribed herein will provide that leases of such equipment apply for a definite period. Such minimum period is necessary to insure proper inspection of equipment and a check of the qualifications of the driver, particularly when the latter is not an employee of the lessee, and we find that a minimum period of 30 days would be reasonable."

In concluding that splitting of the revenues with the owners of leased equipment should be prohibited the Commission said again at page 725:

> "In this connection we observe the carriers which conduct operations entirely in non-owned equipment, and, more particularly, in equipment rented on the basis of a percentage of the revenue earned with the equipment, are in an extremely favorable competitive position as compared with carriers having substantial investments in equipment devoted to for-hire transportation. Moreover, a carrier's inability to provide service except in equipment owned and operated by others raises serious doubts as to its fitness and ability. This is a matter which undoubtedly merits more consideration than it has heretofore received in passing upon applications for operating authority and for extensions of such authority."

And at page 726:

> "We further conclude that compensation for the rental of equipment based upon a percentage of the

[fol. 472] IN UNITED STATES DISTRICT COURT

Civil Action, No. 6758

AMERICAN TRUCKING ASSOCIATIONS, INC., et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

JUDGMENT—Filed December 14, 1951

This cause came on to be heard on the 22nd day of October, 1951, before a duly constituted district court of three

---

revenue earned with equipment should be prohibited. This method of compensation leads the carriers which utilize owner-operated equipment to concentrate upon certain profitable traffic to the exclusion of other traffic. It certainly distorts the operating statistics of carriers which depend to a large extent upon equipment leased on that basis. We are persuaded also that it plays a large part in the practice of carriers which have extensive operating rights, but are unable or unwilling to provide service thereunder, of leasing such rights to others under the guise of equipment leases."

Typical examples of problems arising out of interchange practices, of which there is substantial evidence in the record, are:

(a) Carrier had rights between Chicago and Louisville, Kentucky but solicited traffic beyond Louisville. The Chicago carrier performed all the transportation to points beyond Louisville and retained all the revenue, merely using the shipping documents of the local Kentucky carrier to cover the movements beyond Louisville. (52 M. C. C. 675, 685)

(b) Carrier having no right to serve beyond St. Louis served territory outside of St. Louis in its own operation by merely using a lease secured from a local carrier covering the movement beyond St. Louis for which a flat fee of from three to five dollars was paid. This was merely typical

judges. The court first considered the several motions to stay proceedings in this action pending the determination of other actions involving the same issues and some of the same parties pending in other district courts and announced its opinion that such motions were due to be denied.

Thereafter, the parties hereto, in open court, consented to the submission of this cause for final judgment upon plaintiffs' prayer for a permanent injunction to set aside or annul the order of defendant, Interstate Commerce Commission, entered May 8, 1951, in proceedings entitled "Lease and Interchange of Vehicles by Motor Carriers, Ex Parte No. MC-43." Thereupon, the court took this action under submission on the pleadings and the proof, including the record of the proceedings before the Commission, and briefs and reply briefs of the respective parties.

In conformity with the opinion of the court contemporaneously filed herewith:

It is, accordingly, Ordered, Adjudged and Decreed by the court that plaintiffs are not entitled to any relief for which they have prayed and that this action be and the same is hereby dismissed with prejudice.

It is further Ordered, Adjudged and Decreed that the costs of court incurred herein be and the same are hereby taxed against plaintiffs, for which execution may issue.

---

of other instances of the same thing in Georgia and other points. (52 M. C. C. 675, 685, 686 and 687)

To prevent the carriers from leasing the rights of other carriers under the guise of interchange arrangements, the Commission concluded that the interchange arrangements should necessitate service by two or more carriers rather than service by one carrier over two certificates. The only way to make certain that two carrier service is rendered is to have the employes of Carrier B operate the equipment received from Carrier A when it is moving over Carrier B's route. At page 722 (52 M. C. C. 675) the Commission said:

> "* * * A requirement that interchanged equipment must be driven by the employee of the carrier receiving it would prevent these practices."

Done, at Birmingham, Alabama, this 14th day of December, 1951.

Leon McCord, United States Circuit Judge. Charles B. Kennamer, United States District Judge. Seybourn H. Lynne, United States District Judge.

[File endorsement omitted.]

[fol. 473] In United States District Court

[Title omitted]

Petition for Appeal—Filed January 29, 1952

The American Trucking Associations, Inc., et al., plaintiffs in the above entitled cause, feeling themselves aggrieved by the Order of the Court entered herein on the 14th day of December, 1951, for the reasons set forth in their Assignment of Errors which is filed herewith, hereby pray an appeal from such Order to the Supreme Court of the United States, and further pray that a transcript of the record on appeal be certified and sent to the Supreme Court of the United States.

Respectfully submitted, Marc Ray Clements, Tuscaloosa, Alabama, Edgar S. Idol, Harry E. Boot, James W. Wrape, George S. Dixon, Herbert Baker, Joseph H. Blackshear, Noel F. George, William R. Hefferan, Attorneys for Plaintiffs. Marc Ray Clements.

LeMaistre, Clements & Gewin, Of Counsel.
January 29, 1952.

[File endorsement omitted.]

[fol. 474] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 29, 1952

The American Trucking Associations, Inc., et al., plaintiffs in the above entitled cause, submit the following Assignment of Errors on which they rely on their appeal to the Supreme Court of the United States from the judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered on the 14th day of December, 1951.

The Court erred:

1. In finding that the National Transportation Policy was intended to expand the statutory jurisdiction of the Commission to include regulation of leasing practices of motor carriers.

2. In finding that Sections 202(a), 203(a) (19) and 204(a) (1) and (2) of the Interstate Commerce Act confer authority to regulate leasing practices.

3. In finding that Section 216(c) of the Interstate Commerce Act confers authority to promulgate rules covering interchange of equipment to the extent that leased equipment cannot be interchanged.

[fol. 475] 4. In finding that Sections 208(a) and 209(b) of the Interstate Commerce Act presuppose a preceding grant of power to regulate leasing practices.

5. In finding that the Commission rules did not offend Article I, Section 1 of the Constitution.

6. In finding that the Commission complied with the provisions of the Administrative Procedure Act, Title 5, United States Code, Section 1001 et seq.

7. In finding that the rules are not unreasonable or arbitrary because they prescribe absolute uniformity with respect to carriers to which they apply.

Wherefore, plaintiffs pray that such order of the District Court be reversed and judgment be entered enjoin-

ing, setting aside or annulling the Interstate Commerce Commission's Order of May 8, 1951.

Respectfully submitted, Marc Ray Clements, Tuscaloosa, Alabama, Edger S. Idol, Harry E. Boot, James W. Wrape, George S. Dixon, Herbert Baker, Joseph H. Blackshear, Noel F. George, William R. Hefferan, Attorneys for Plaintiffs, Marc Ray Clements.

LeMaistre, Clements & Gewin, Of Counsel.

January 29, 1952.

[File endorsement omitted.]

[fols. 476-478] Bond on Appeal for $500.00 approved and filed February 5, 1952 omitted in printing.

[fol. 479] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed February 5, 1952

Appellants in the above entitled cause having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the decree of the District Court made and entered in the above entitled cause on December 14, 1951, and having presented and filed its petition for appeal, accompanied by an assignment of errors, a statement as to jurisdiction and prayer for reversal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

It is now ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final decree of the District Court composed of Circuit Judge McCord and District Judges Kennamer and Lynne, dated December 14, 1951, and